

**DEPARTMENT OF CONSUMER AND REGULATORY
AFFAIRS****NOTICE OF PUBLIC INTEREST**

The Director of the Department of Consumer and Regulatory Affairs pursuant to D.C. Law 2-144, effective March 3, 1979-, "**The Historic Landmark and District Protection Act of 1978**" hereby gives notice that the addresses listed below, as requested permission to demolish, altar, sub-divide or erect new structures at the following location(s):

Application Date	Address	Lot	Square	Use
03-26-04	3414 Volta Pl, N.W.	830	1253	Fence/SFD
	3021 Ordway St., N.W.	834	2067	Concept
03-29-04	2001 Conn. Ave., N.W.	308	2536	Window/Door/Office
03-30-04	3025 Cambridge Rd., N.W.	242	1282	Fence/SFD
04-01-04	1331 Penn. Ave., N.W.	837	254	Canopy/Office
04-02-04	2456 20 th St., N.W.		2544	Window/Condo
04-06-04	1241 Good Hope Rd., S.E.	803	5769	Add/Office
	1119 6 th St., N.W.	61	482	New Construction
04-08-04	3222 M St., N.W.	861	1200	Façade/Retail

**DEPARTMENT OF CONSUMER AND REGULATORY
AFFAIRS****NOTICE OF PUBLIC INTEREST**

Forwarded for your information is a weekly listing of raze permit application filed with the Permit Service Center of the Building and Land Regulation Administration, requesting a permit to raze listed structures with the District of Columbia.

Application Date	Address	Lot	Square	Use
03-25-04	3801 Georgia Ave., N.W.	55	3028	1-Story Com Bldg
03-29-04	1822 Kalorama Rd., N.W.	822 & 810	2553	3-Story SFD
	3910 4 th St., S.E.	806	6154	3-Story Apt. Bldg
	271 Valley Ave., S.E.	812	6153	1-Story SFD
04-05-04	1602-14 L St., N.W.	845	184	2-Story Garage
04-07-04	1821 1 st St., N.W.	803	3110	1-Story Comm

**BOARD OF ELECTIONS AND ETHICS
CERTIFICATION OF ANC/SMD VACANCIES**

The District of Columbia Board of Elections and Ethics hereby gives notice that there are vacancies in **seventeen (17)** Advisory Neighborhood Commission offices, certified pursuant to D.C. Official Code §1-309.06(d)(2);2001 Ed.

VACANT: 7D07

Petition Circulation Period: **Wednesday, April 7, 2004 thru Tuesday, April 27, 2004**

Petition Challenge Period: **Friday, April 30, 2004 thru Thursday, May 6, 2004**

VACANT: 4C05

Petition Circulation Period: **Monday, April 12, 2004 thru Monday, May 3, 2004**

Petition Challenge Period: **Thursday, May 6, 2004 thru Wednesday, May 12, 2004**

**VACANT: 3B01, 3B04
 5A01**

Petition Circulation Period: **Tuesday, April 13, 2004 thru Monday, May 3, 2004**

Petition Challenge Period: **Thursday, May 6, 2004 thru Wednesday, May 12, 2004**

**VACANT: 3D07, 3D08, 3E05
 4A05
 5C10, 5C11
 6B11
 8B03, 8C05, 8C06, 8E01**

Petition Circulation Period: **Wednesday, April 14, 2004 thru Tuesday, May 4, 2004**

Petition Challenge Period: **Friday, May 7, 2004 thru Thursday, May 13, 2004**

VACANT: 2A06

Petition Circulation Period: **Monday, April 19, 2004 thru Monday, May 10, 2004**

Petition Challenge Period: **Thursday, May 13, 2004 thru Wednesday, May 19, 2004**

Candidates seeking the Office of Advisory Neighborhood Commissioner, or their representatives, may pick up nominating petitions at the following location:

**D.C. Board of Elections and Ethics
441 - 4th Street, NW, Room 250N**

For more information, the public may call **727-2525**.

**Government of the District of Columbia
Public Employee Relations Board**

In the Matter of:

Fraternal Order of Police/Metropolitan
Police Department Labor Committee
(on behalf of Grievant, David Blue, et. al-
Spring Valley Detail)

Petitioner,

and

District of Columbia
Metropolitan Police Department,

Respondent.

PERB Case No. 03-A-03

Opinion No. 726

FOR PUBLICATION

DECISION AND ORDER

The Fraternal Order of Police /Metropolitan Police Department Labor Committee ("FOP" or "Union") filed an Arbitration Review Request ("Request") in the above captioned matter. FOP seeks review of an Arbitration Award which dismissed a grievance because the Arbitrator determined that it was not arbitrable.¹ Specifically, FOP claims that the Arbitration Award is contrary to law and public policy pursuant to D.C. Code §1-605.2(6) (2001 ed.)². The Metropolitan Police Department ("MPD" or "Agency") opposes the Request.

The issue before the Board is whether "the award on its face is contrary to law and public policy" pursuant to D.C. Code Sec. 1-605.2(6)(b). Upon consideration of the Request, we find that

¹The Arbitrator reached this conclusion after reviewing the collective bargaining agreement (CBA) and determining that the section of the CBA cited by FOP, which concerned overtime under the Fair Labor Standards Act, was inoperative during the relevant time period.

²Throughout this Opinion, all references to the D.C. Code refer to the 2001 edition.

Decision and Order

PERB Case No. 03-A-03

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FOP has *not* established a statutory basis for our review. Therefore, pursuant to Board Rule 538.4, FOP's request for review is denied.

A number of police officers represented by FOP volunteered and were assigned to work a detail which involved overtime, hereinafter referred to as the Spring Valley Detail. The officers assigned to the overtime detail provided security and escort services to assist in the clean-up and detoxification of a World War II-era hazardous waste site. This detail was operated 24-hours a day, 7 days a week and required continuous police oversight. MPD solicited volunteers for the detail with the understanding that overtime would be paid for all qualifying hours of duty performed. From March 24, 2002 until May 14, 2002, MPD paid no overtime to union members working the Spring Valley Detail. Consequently, FOP filed a grievance on May 14, 2002 based on MPD's failure to make timely payments for overtime labor performed by David Blue and similarly situated police officers.³ In its grievance, the Union contended that this was a violation of the parties' CBA and the Fair Labor Standards Act (FLSA). The Arbitrator⁴ found that the grievance was *not* arbitrable because Article 30, §2⁵, the section of the collective bargaining agreement (CBA) cited by FOP in its grievance, was inoperative⁶. Therefore, FOP's grievance was denied.

FOP now seeks review of the Arbitrator's decision to dismiss its grievance on the basis that it is contrary to law and public policy. Specifically, the Union claims that its failure to cite the correct and operative section of the CBA was a mere technicality and that public policy favors arbitration where parties have previously agreed to arbitrate matters.⁷ In addition, FOP contends

³The record reflects and it is not disputed that the officers did receive their overtime payments; however the payments were delayed. As a result, the Union contends that the untimeliness of the overtime payment is a violation of the CBA and the Fair Labor Standards Act (FLSA). Therefore, FOP requested liquidated damages as a remedy for the delay in payment pursuant to the applicable section of the FLSA.

⁴Arbitrator Donald H. Doherty issued this decision.

⁵Article 30, §2, as cited in FOP's grievance, provides as follows:

To the extent that the Employer's present policies, procedures and practices equal or exceed the requirements of the Fair Labor Standards Act, those policies, procedures, and practices shall remain in effect, except as otherwise provided herein.

⁶In its brief to the arbitrator, FOP admitted that the section of the CBA which it cited was inoperative.

⁷FOP relies on Gateway Coal Co. v United Mine Workers of America, 414 U.S. 368, 377-78 (1974) as authority for its positions. Specifically, it asserts that "[A]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.

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that the officers who prepare the grievances are not lawyers, and should not be held to the higher standard of interpreting the contract in order to cite the correct section. FOP also asserts that MPD had an obligation to notify it of the error and provide an opportunity to resubmit the grievance in its corrected form⁸. Finally, FOP argues that MPD should be required to pay the liquidated damages because it acknowledged responsibility for its duty to pay the overtime in its initial response to the Union's request for overtime.

MPD asserts that the Chief of Police made the Union aware that the grievance cited an inoperative provision in his first response to the grievance/arbitration demand.⁹ In addition, MPD asserts that if the Arbitrator had allowed review of a grievance that was based on an inoperative section of the parties' CBA, he would have been impermissibly adding to the CBA in violation of Article 19E, §5, Part 4 of the parties' CBA.¹⁰ Finally, MPD contends that the Union has not cited any language which supports its premise that the denial of a grievance because it is based on inoperative language is against law and public policy. Therefore, MPD has not stated any statutory basis for reversing the arbitrator's decision.

Notwithstanding the authority cited above, we believe that FOP's asserted grounds for review only involve a disagreement with the Arbitrator's interpretation of the parties' CBA and his determination that the grievance was not arbitrable. Moreover, FOP merely requests that we adopt its view that the grievance was arbitrable.

Doubts should be resolved in favor of coverage." See also, Gateway Coal Co. v United Mine Workers of America, 414 U.S. 368, 377-78 (1974) and United Steelworkers of America v Warrior & Gulf Navigation Co., 363 U.S. 574, 582-583 (1960). "The public policy favoring arbitration is grounded in the understanding that labor arbitration is 'the substitute for industrial strife.'" Id.

⁸In response to this claim, the Board notes that in correspondence to the Union, MPD informs FOP, on at least two occasions, of its belief that the section of the CBA which FOP cited in its grievance was inoperative and that the grievance had no basis. In addition, the record contains a response from FOP which indicates its willingness to allow the Arbitrator to determine whether: (1) the cited section of the CBA was operative and (2) the grievance was arbitrable.

⁹ In addition, the Chief of Police noted that he believed that the grievance was initially filed at the wrong level of authority and should have been filed at a lower level before it reached him.

¹⁰MPD also argued that based on Article 19E, §5, Part 2 of the parties' CBA, FOP should not be permitted to assert any ground or rely on any evidence at arbitration that was not previously disclosed to the other party. Specifically, MPD refers to FOP's argument that its members who file grievances are not lawyers and should not be held to that higher standard when filing grievances. MPD asserts that this argument should not be entertained because it was not presented to the Arbitrator. MPD also contends that FOP's argument on this issue should be rejected because the police officers who file grievances were released by MPD to attend training on the topic of preparing grievances.

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We have held that an arbitrator's authority is derived "from the parties' agreement and any applicable statutory and regulatory provision." D.C. Dept. of Public Works and AFSCME, Local 2091, 35 DCR 8186, Slip Op. No. 194, PERB Case No. 87-A-08 (1988). In addition, we have held that "[b]y agreeing to submit the settlement of [a] grievance to arbitration, it [is] the Arbitrator's interpretation, not the Board's, that the parties have bargained for." University of the District of Columbia and University of the District of Columbia Faculty Association/NEA, 39 DCR 9628, Slip Op. No. 320 at p.2, PERB Case No 92-A-04 (1992). Also, we have found that by submitting a matter to arbitration, "the parties agree to be bound by the Arbitrator's interpretation of the parties agreement and related rules and regulations as well as his evidentiary findings and conclusions upon which the decision is based." Id. Moreover, "[t]he Board will not substitute its own interpretation or that of the Agency's for that of the duly designated arbitrator." District of Columbia Department of Corrections and International Brotherhood of Teamsters, Local Union No. 246, 34 DCR 3616, Slip Op. No. 157 at p. 3, PERB Case No. 87-A-02 (1987).

We have also held that a "disagreement with the arbitrator's interpretation. . . does not make the award contrary to law and public policy." AFGE, Local 1975 and Dept. of Public Works, Slip Op. No 413, PERB Case No. 95-A-02 (1995). To set aside an award as contrary to law and public policy, the Petitioner must present applicable law and definite public policy that mandates that the arbitrator arrive at a different result. See, AFGE, Local 631 and Dept. of Public Works, 45 DCR 6617, Slip Op. No. 365, PERB Case No. 93-A-03 (1993). In the present case, FOP's claim involves only a disagreement with the Arbitrator's interpretation of the parties' CBA and his decision on arbitrability. Moreover, FOP does not cite any applicable legal precedent or any public policy which supports its position. Thus, FOP has failed to point to any clear or legal public policy which the Award contravenes.

We find that the Arbitrator's conclusion is based on a thorough analysis and cannot be said to be clearly erroneous or contrary to law and public policy. Rather, FOP merely disagrees with the Arbitrator's conclusion of non-arbitrability. This is *not* a sufficient basis for concluding that the Arbitrator's Award is contrary to law and public policy. For the reasons discussed, no statutory basis exist for setting aside the Award; the Request is therefore, denied.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Arbitration Review Request is denied.
2. Pursuant to Board Rule 559.1, this Order shall be final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

March 5, 2004

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD**

In the Matter of:

DISTRICT OF COLUMBIA
FIRE AND EMERGENCY SERVICES
DEPARTMENT,

Petitioner,

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, LOCAL 3721,

Respondent.

PERB Case No. 02-A-08

Opinion No. 728

FOR PUBLICATION

DECISION AND ORDER

The District of Columbia Fire and Emergency Services Department ("FEMS", "Petitioner" or "Agency"), filed an Arbitration Review Request ("Request") in the above caption matter. Specifically, FEMS seeks reversal of an Arbitrator's¹ Award which found that FEMS violated its collective bargaining agreement (CBA) with the American Federation of Government Employees, Local 3721("AFGE", "Respondent" or "Union").² AFGE opposes the Request.³

The issue before the Board is whether "the Award on its face is contrary to law..." D.C. Code§1-605.02(6) (2001 ed.).⁴

In 1999, FEMS instituted a new program which paired paramedics with firefighters on fire engines in an attempt to improve response times for reaching accident scenes. The paramedics

¹Charles Donegan was the Arbitrator in this matter.

²The underlying grievance asserted that FEMS violated the parties' CBA by requiring paramedics to work 24 hour shifts, when their contract specified that their shifts were not to exceed 12 hours a day.

³The reasons for AFGE's opposition are outlined in detail in its document entitled, "AFGE Local 3721's Opposition to Arbitration Review Request." (" Opposition").

⁴Throughout this Opinion, all references to the D.C. Code refer to the 2001 edition.

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served on a voluntary basis. The Union objected to this new program because it required paramedics to work 24 hour shifts, instead of the 12 hour shifts allowed by the plain language of their collective bargaining agreement with FEMS.⁵ As a result, the Union filed a grievance concerning the matter. After the grievance reached the arbitration stage, the Arbitrator found that FEMS had violated the plain language of the parties' CBA. Specifically, he concluded that FEMS had improperly allowed Emergency Personnel to work twenty-four (24) hour shifts, despite the fact that the language in the paramedics' CBA specified that their shifts were not to exceed twelve (12) hours. (Award at pgs. 8-9).

FEMS takes issue with the Arbitrator's Award. Specifically, the Agency asserts that the Arbitration Award, on its face, is contrary to law.⁶ Furthermore, FEMS argues that it had authority

⁵ An Addendum to the AFGE and FEMS CBA described the work schedules for Emergency Ambulance Bureau Personnel and provided the following:

Emergency Ambulance Bureau personnel shall work twelve (12) hour shifts as their normal scheduled daily tour of duty and which shall continue to constitute for pay and leave purposes, a forty (40) hour workweek in a 24-week cycle.

This Addendum was incorporated into the parties' CBA. (See, Award at pg.4).

⁶As a procedural matter, FEMS argued that the grievance was not arbitrable on the basis of untimeliness, based on the fact that the Union did not file its grievance until the new program had been in place for over a year. The Arbitrator dismissed this argument by finding that the Agency's action was a continuing violation; therefore, the time for filing a grievance had not expired. The Board concludes that this finding is reasonable and supported by the record.

In addition, FEMS relied on Federal Labor Relations Authority (FLRA) precedent for its argument that the Arbitrator's Award was in error because it abrogated a management right. See, Department of the Treasury, U.S. Customs Service and National Treasury Employees' Union (DOT and NTEU), 37 FLRA 309, 314 (1990). According to DOT and NTEU, an arbitration award abrogates a management right when the award precludes an Agency from exercising that management right. Furthermore, FEMS asserts that a management right cannot be waived or relinquished through collective bargaining. See, Southwestern Power Administration and International Brotherhood of Electrical Workers, Local 1002, 22 FLRA 475, 476 (1986). While this may be the case according to the FLRA precedent, the Board has established that management may waive its right by consenting to bargain over an issue where it has no duty to. To explain further, there are three categories of subjects for bargaining pursuant to the CMPA. Those

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to institute the change based on Managements' exclusive statutory right to set an employee's tour of duty⁷ and maintain the efficiency of the government, pursuant to D.C. Code §1-617.08 (a)(4) and(5).

We have held that an Arbitrator's authority is derived "from the parties' agreement and any applicable statutory and regulatory provision." D.C. Dept. of Public Works and AFSCME, Local 2091, 35 DCR 8186, Slip Op. No. 194, PERB Case No. 87-A-08 (1988). In addition, we have held that "[b]y agreeing to submit the settlement of [a] grievance to arbitration, it [is] the Arbitrator's interpretation, not the Board's, that the parties have bargained for." University of the District of Columbia and University of the District of Columbia Faculty Association/NEA, 39 DCR 9628, Slip Op. No. 320 at p.2, PERB Case No 92-A-04 (1992). Also, we have found that by submitting a matter to arbitration, "the parties agree to be bound by the Arbitrator's interpretation of the parties' agreement and related rules and regulations as well as his evidentiary findings and conclusions upon which the decision is based." Id. Moreover, "[t]he Board will not substitute its own interpretation or that of the Agency's for that of the duly designated arbitrator." District of Columbia Department of Corrections and International Brotherhood of Teamsters, Local Union No. 246, 34 DCR 3616, Slip Op. No. 157 at p. 3, PERB Case No. 87-A-02 (1987).

In the present case, the Board finds that FEMS merely disagrees with the Arbitrator's decision and requests that we adopt its interpretation of the contract. However, as indicated above, we will not substitute our interpretation for that of the duly designated Arbitrator. In addition, we have held that a "disagreement with the arbitrator's interpretation. . . does not make the award contrary to law and public policy." AFGE, Local 1975 and Dept. of Public Works, Slip Op. No 413, PERB Case No. 95-A-02 (1995).

⁶(...continued)

categories include:(1) **mandatory subjects**- over which parties must bargain; (2) **permissible subjects**-over which parties may bargain and (3) **illegal subjects**- over which parties may not bargain. See, D.C. Public Schools and Teamsters Local 639 and 730, 38 DCR 2487, Slip Op. No. 273, PERB Case No. 91-N-01 (1991). While it is true that determining the tour of duty and the number of hours of in a workweek and in a workday, are management's rights pursuant to the CMPA, management may choose to bargain over the subjects. As a result, these subjects become permissible subjects of bargaining where no section of the CMPA expressly prohibits bargaining over the issue. In the present case, FEMS chose to bargain concerning the number of hours that paramedics may work and memorialized their agreement with AFGE in an Addendum to the parties' CBA. As a result, the subjects became permissible subjects of bargaining because management waived its exclusive right to bargain over the issue. FEMS does not point to any language in the D.C. Code which prohibits bargaining over the subject of hours of work.

⁷FEMS relies on precedent which held that pursuant to the CMPA, Management has the exclusive right to determine an employee's hours of work and tour of duty.

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The Board has stated that "to set aside an award as contrary to law and public policy, the Petitioner must present applicable law and definite public policy that mandates that the Arbitrator arrive at a different result." MPD v. FOP/MPD Labor Committee, 47 DCR 7217, Slip Op. No. 633, PERB Case No. 00-A-04 (2000).

After reviewing FEMS's "contrary to law" argument, the Board finds that FEMS failed to cite any applicable law that has been violated.⁸

While FEMS correctly noted that establishing employee's tour of duty and maintaining the efficiency of the government⁹ are management's rights,¹⁰ over which the Agency is not required to bargain, it failed to recognize that it waived its right to set the hours of work for paramedics when it negotiated and reached an agreement with AFGE limiting the hours of work to twelve (12)¹¹. As a result, FEMS became bound by language that it negotiated and the Arbitrator found a violation of the CBA. (See, Award at pg. 56).

We find that the Arbitrator's conclusion is based on a thorough analysis and cannot be said to be clearly erroneous or contrary to law and public policy. FEMS merely disagrees with the Arbitrator's conclusion. This is not a sufficient basis for concluding that the Arbitrator's Award is contrary to law or public policy. For the reasons discussed above, no statutory basis exists for setting aside the Award; the Request is therefore, denied.

ORDER

⁸This "contrary to law" argument is outlined in detail in footnote 6 of this Opinion.

⁹These Management's rights are codified at D.C. Code §1-617.08.

¹⁰In the present case, we are not dealing with proposals in a negotiations setting. Instead, FEMS had *already negotiated over the subject of hours of work and agreed to limit the number of hours that paramedics could work in a day to 12 hours*. It was a part of the CBA which the parties chose to have Arbitrator Donegan interpret. Because the Arbitrator found that FEMS scheduled paramedics for more than 12 hours a day, he determined that the Agency violated the CBA.

¹¹ As noted earlier, the Board has held and the D.C. Court of Appeals has affirmed that management has the right under the CMPA to determine an employee's Hours of Work, and that proposals by a union which seek to abrogate that right are non-negotiable. See, Drivers, Chauffeurs and Helpers Local Union No. 639, et.al. v. Public Employee Relations Board, 631 A.2d. 1205, 1211 (D.C. 1993) and D.C. Public Schools and Teamsters Local 639 and 730, 38 DCR 2487, Slip Op. No. 273, PERB Case No. 91-N-01 (1991). However, the Board has also held that a subject over which a party is not required to bargain may become a permissible subject of bargaining, if the Agency agrees to negotiate over the subject. See, Id.

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IT IS HEREBY ORDERED THAT:

1. The Arbitration Review Request is denied.
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

September 30, 2003

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD**

In the Matter of:

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, LOCAL 631,

Complainant,

v.

DISTRICT OF COLUMBIA
WATER AND SEWER AUTHORITY,

Respondent.

PERB Case No. 02-U-19

Opinion No. 730

FOR PUBLICATION

DECISION AND ORDER

This case involves an unfair labor practice complaint filed by the American Federation of Government Employees, Local 631 ("Complainant", "AFGE" or "Union"), alleging that the District of Columbia Water and Sewer Authority ("Respondent", "WASA" or "Agency") violated D.C. Code §1-617.04 (a)(1) and (5) (2001 ed.). Specifically, AFGE alleges that WASA committed an unfair labor practice by: (1) failing to bargain, upon request, over Reduction-in-Force (RIF) procedures; (2) failing to bargain, upon request, over the impact and effects of new employer policies and changes to existing policies, procedures and practices; and (3) failing to produce documents upon request.¹

¹ AFGE's Complaint makes the following specific claims. First, AFGE claims that WASA violated the CMPA by failing to bargain over RIF procedures. In addition, AFGE contends that WASA unlawfully refused to bargain over changes to the following: (1) Duty task lists; (2) Policies for Annual Leave, Sick Leave and Termination of Employment; (3) Neutral Party Process; (4) Sign In and Sign Out Policy and Record of Discussion Document; (5) Other Personnel Policies; (6) Evaluations; (7) Internal Improvement Plan ("IIP") at Blue Plains; (8) Minimum crew sizes, consolidation of facilities; (9) relocation of employees; (10) permitting contractors to take WASA certification classes; and (11) refusing to permit or making it difficult for bargaining unit members to take training. Finally, AFGE claims that WASA unlawfully

(continued...)

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The Respondent denies the allegations. Specifically, the Respondent contends that it had no duty to bargain over RIF procedures because the Comprehensive Merit Personnel Act (CMPA) gives Agency Heads the exclusive authority to abolish positions through a RIF.² In addition, WASA claims that it informed the Union, in writing, of its position concerning negotiating over RIF procedures. WASA denies claims that the Agency implemented new or changed existing policies and procedures, without first the Union to opportunity to bargain over their impact and effects. In support of its denial, WASA claims and cites instances where it gave the Union opportunities to comment on the new policies and procedures and AFGE did not respond in the time specified. In addition, WASA also cites instances where the Union did not respond to its requests for clarification on policies it objected to. WASA also contends that it made no changes to the policies in many cases where the Union alleged that it did; rather, it merely updated the same language that had been used before. As to the document request, WASA contends that although there was some delay, it did provide the requested information to AFGE.³

A hearing was held, and the Hearing Examiner issued a Report and Recommendation (Report). In her Report, the Hearing Examiner found that AFGE failed meet its burden of proof as to any of the allegations raised. As a result, she recommended that AFGE's complaint be dismissed.

AFGE presented numerous exceptions⁴ to the Hearing Examiner's Report. The Board will not list all of their Exceptions in this Opinion because many of them repeat the position that the Union argued unsuccessfully during the hearing. Furthermore, we find that some of the other exceptions disagree with: (1) the Hearing Examiner's analysis of the evidence; (2) the weight she

¹(...continued)
refused to respond to an information request.(Complaint).

²In their filings, the Agency cites D.C. Code §1-615.07 (2001 ed.) as the relevant section of the D.C. Code ("Code") which gives the Agency the authority to refuse to bargain over RIF procedures. However, we found that the correct section of the code is D.C. Code §1-624.08, which provides, in pertinent part, that: "each agency head is authorized, within the agency head's discretion, to identify positions for abolishment." (2001 ed.).

³In FOP v. MPD, the Board also observed that "in the interest of advancing the collective bargaining process, the better approach, upon being faced with [such] an effective refusal to bargain over any aspect of management's decision, is [for the union] to then make a second request to bargain with respect to the specific effects and impact of the management decision." 47 DCR 1449, Slip Op. No. 607, PERB Case No. 99-U-44 (2000). However, the Board qualified that statement by indicating that "a second request to bargain is not required to establish a violation of the CMPA." Id at p. 4.

⁴AFGE's objections are outlined in detail in their document entitled "Complainant's Exceptions to Hearing Examiner's Report and Recommendation." (Exceptions).

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gave certain testimony; (3) and her ultimate findings on those issues. However, the Board will address several of the key issues which we believe need to be addressed or need further clarification in the paragraphs that follow.

RIF Procedures

On the issue of RIF procedures, the Hearing Examiner was persuaded by WASA's argument that they had no obligation to bargain over procedures based on the fact that the CMPA gave the Agency's Department Head authority to abolish positions through RIFs. She also noted that the Union cited no authority to dispute WASA's claim. While the Board adopts the Hearing Examiner's conclusion that WASA had no duty to bargain over the RIF procedures, we reach our conclusion on a different basis.

In Fraternal Order of Police/Department of Corrections Labor Committee v. District of Columbia Department of Corrections⁵, the Board expressly held that RIF procedures are non-negotiable. 49 DCR 11141, Slip Op. No. 692 at p.5, PERB Case No. 01--01(2002). We based our decision on a thorough review and analysis of the Omnibus Personnel Reform Amendment Act of 1998, which revised the previous RIF regulations and eliminated a provision which had allowed RIF policies and procedures to be appropriate matters for collective bargaining. See, *Id.* We believe that this Board precedent is applicable to the case presently before us. As a result, we find that Hearing Examiner's conclusion that the RIF procedures were not negotiable is reasonable, supported by the record, and consistent with the Board precedent noted above.

Internal Improvement Plan

In its Exceptions, AFGE argues the Hearing Examiner's denial of its request to recall Barbara Milton as a witness was in error and that it would have been able to provide information concerning the IIP allegation had Ms. Milton been able to testify.⁶ AFGE elaborates and explains that "counsel for the Union inadvertently forgot to ask Ms. Milton questions concerning the unilateral changes arising out of the IIP, but sought to rectify the oversight at the end of the Union's

⁵In this Negotiability Appeal, FOP sought to have the Board find negotiable a proposal which altered RIF procedures. The Board declined to do so after making a determination that RIF procedures were no longer negotiable under the new law. See, Fraternal Order of Police/Department of Corrections Labor Committee v. District of Columbia Department of Corrections, 49 DCR 11141, Slip Op. No. 692, PERB Case No. 01--01(2002).

⁶The Union argues that it would have offered evidence to support its allegations concerning WASA's IIP, but the Hearing Examiner improperly refused to allow a witness to be recalled before WASA started its case-in-chief. (See, Exceptions at pg. 6).

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case-in-chief by recalling Ms. Milton⁷.”

The Board is not persuaded by this argument because after reviewing the transcript, we find that the Union had concluded its case-in-chief before seeking to reserve the right to recall Ms. Milton.⁸ In addition, the Board's Rules give the Hearing Examiner broad authority to conduct hearings. See, Board Rules No. 550.12-550.14. In addition, we have held that a hearing is not tainted where parties have adequate opportunity to present evidence and argument. Pratt v. D.C. DAS, 43 DCR 1490, Slip Op. No. 457, PERB Case No. 95-U-06 (1996). We have also held that a Hearing Examiner has the authority to conduct a hearing and decide evidentiary matters. See, Id. and Mack, Lee and Butler v. FOP/DOC, 47 DCR 6539, Slip Op. No. 421, PERB Case No. 94-U-24 (2000). In the present case, by the Union's own admission, its Counsel forgot to present testimony concerning the issue during their case-in-chief, despite the fact that they had an opportunity to present evidence and argument on this matter. In view of the precedent listed above, we find that the Hearing Examiner's decision is consistent with Board precedent. Furthermore, we find that the Hearing Examiner's decision not to allow further testimony from Ms. Milton once the Union had rested its case-in-chief is reasonable and supported by the record. We have found that challenges to evidentiary findings do not give rise to a proper exception where, as here, the record contains evidence supporting the Hearing Examiner's finding. Hatton v. FOP/DOC Labor Committee, 47 DCR 769, Slip Op. No. 451 at p. 4, PERB Case No. 95-U-02 (2000). As a result, we find that the Union's exception on to the Hearing Examiner's finding, that AFGE did not meet its burden of proof concerning changes to the IIP, lacks merit. Therefore, we adopt the Hearing Examiner's finding on this issue.

Document Production

In this Exception, AFGE claims that the Union is not required to demonstrate “bad faith” in order to prove that WASA violated D.C. Code §1-617.04 (a)(5) (2001 ed.) of the CMPA by refusing to provide the Union with the requested bargaining information.”⁹ (Exceptions at pg. 8).

⁷The reference to Ms. Milton in this sentence refers to Barbara Milton, the Union's President.

⁸We find that the record reflects that Hearing Examiner asked the Union's counsel if she was finished with her case-in-chief and she indicated “yes”. The Union's counsel later added that she might like to reserve the right to call Ms. Milton in terms of a couple of issues on the IIP. WASA's counsel objected to the Union being able to recall Ms. Milton to address those issues based on the fact that the Union had not raised IIP issues in its case in chief. (See, Exceptions at pg. 6 and Tr. at pgs. 165-166).

⁹The Union also argues that it had no obligation to request documents twice, as it claims
(continued...)

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AFGE is correct in its assertion that the Board's precedent has not required that there be an affirmative showing of bad faith in delaying to produce documents before an unfair labor practice violation can be found.¹⁰ Nevertheless, the Hearing Examiner's finding concerning the document production issues seems reasonable and supported by the record.

In the present case, the Hearing Examiner found that the documents were eventually produced and that the delay did not rise to the level of an unfair labor practice. The Hearing Examiner also looked at the course of dealing between these two parties and found that both parties had delayed responding to each other's requests on occasion. As a result, she concluded that AFGE had not met its burden of proof.

The Board has found that failing to timely produce document is an unfair labor practice where the delay was unreasonable. See, Doctors Council of D.C. General Hospital v. D.C. General Hospital, 46 DCR 6268, Slip Op. No. 482, PERB Case Nos. 95-U-10 and 95-U-18 (1996). In one such case where the Board found an unfair labor practice for failing to produce documents: (1) the Union had made two requests; (2) there was a six month delay in producing the documents; (3) and the Union had filed a Motion for Summary Judgement on the issue before the Agency produced the documents. In the present case: (1) the delay was over 3 months; (2) there had only been one request for the document; and (3) the documents were, in fact, produced.

In the present case, the Hearing Examiner concluded that the Complainant had not met its burden of proof in showing that the Respondent refused to bargain in good faith concerning this matter. In view of these facts and the Board precedent noted above, we find that the Hearing

⁹(...continued)

the Hearing Examiner suggests in her decision. (Exceptions at pgs. 9-10). We also find no merit to this Exception. The Board finds that Hearing Examiner merely points to a prior decision by the Board which suggests that in the interest of labor relations, it may be better to request documents a second time when it is unclear as to whether the other party is refusing to produce them or refusing to bargain in good faith. See, Report at pg. 15 and International Brotherhood of Police Officers, Local 446 v. District of Columbia General Hospital, 39 DCR 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1992). We do not read the Hearing Examiner's decision as requiring that AFGE request the documents twice. Instead, she suggested that "where there has not been a negative response, but a somewhat vague and delayed communication", it may be helpful to make a second request. (Report at pg. 15). In this case, there was a delay in producing the documents, and they were eventually produced. She suggests that a second request may have made WASA's position more clear. (See, Report at pg. 15). Therefore, we do not find that the Hearing Examiner erred in making this suggestion.

¹⁰ In finding that no unfair labor practice was committed, the Hearing Examiner stated that "the delay in responding is in excess of three months." While significant, it is not, standing alone, sufficient to establish bad faith on the part of WASA." (See, Report at 15).

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Examiner's conclusion that WASA's conduct did not rise to the level of an unfair labor practice seems reasonable, although her suggestion that "bad faith" needed to be shown is not an accurate statement of the Board's standard. Therefore, in this Opinion, we seek to clarify the standard by noting that a showing of bad faith is not required in order to find a ULP; rather, the Complainant's must show that the delay was unreasonable and that the Respondent failed to produce the documents in a timely manner.

As to the other Exceptions raised in AFGE's Exceptions, we find that they lack merit and merely represent a disagreement with the Hearing Examiner's findings.

After reviewing the record in the present case, we find that the Hearing Examiner's findings, are reasonable and supported by the record, in view of the clarifications noted above. Additional review of the record reveals that the Agency's Exceptions amount to no more than a disagreement with the Hearing Examiner's findings of fact. This Board has held that a mere disagreement with the Hearing Examiner's findings is not grounds for reversal of the Hearing Examiner's findings where the findings are fully supported by the record. American Federation of Government Employees, Local 874 v. D. C. Department of Public Works, 38 DCR 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-16, 89-U-18 and 90-U-04 (1991). The Board has also rejected challenges to the Hearing Examiner's findings based on: (1) competing evidence; (2) the probative weight accorded evidence; and (3) credibility resolutions. American Federation of Government Employees, Local 2741 v. D. C. Department of Recreation Parks, 46 DCR 6502, Slip Op. No. 588, PERB Case No. 98-U-16 (1999). On this basis, we conclude that the Union's Exceptions lack merit. Therefore, we adopt the Hearing Examiner's finding that WASA did *not* commit an unfair labor practice in this matter. In doing so, we clarify the Board's precedent on an unfair labor practice based on a party's failure to produce documents, as noted above. We also clarify and incorporate the Board's precedent and position that there is no duty to negotiate over RIF procedures..

Since we have adopted the Hearing Examiner's finding that WASA did not violate the CMPA, we dismiss AFGE's Complaint in its entirety.

Pursuant to D.C. Code §1-605.02(3) (2001 ed.) and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner and for the reasons discussed above, we adopt the Hearing Examiner's findings, with the clarifications mentioned above.

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ORDER

IT IS HEREBY ORDERED THAT:

1. The Complaint filed by the American Federation of Government Employees, Local 631, against the District of Columbia Water and Sewer Authority (WASA), is dismissed.
2. Pursuant to Board Rule 559.1, this Order shall be final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

September 30, 2003

**Government of the District of Columbia
Public Employee Relations Board**

In the Matter of:)

American Federation of State,
Country and Municipal Employees,
District Council 20,
Local 2921, AFL-CIO,)

Complainant,)

v.)

District of Columbia Public Schools,)

Respondent.)

PERB Case No. 03-U-17

Opinion No. 731

Motion for Compliance and Enforcement

FOR PUBLICATION

DECISION AND ORDER

I. Statement of the Case:

The American Federation of State, County and Municipal Employees, District Council 20, Local 2921 ("Complainant", "AFSCME" or "Union"), filed a Motion for Compliance and Enforcement ("Motion"), in the above-referenced case. The Complainant alleges that the District of Columbia Public Schools ("DCPS" or "Respondent") has failed to comply with Slip Opinion No. 712. Specifically, the Complainant claims that DCPS "has failed and refused ... to [provide the Grievant Davette Butler with her] backpay, as ordered by the Board." (Motion at p. 1). The Complainant is asking the Board to: (1) find that DCPS has failed to comply with the Board's Order in Slip Opinion No. 712 and (2) bring an action in the District of Columbia Superior Court to compel DCPS to comply with the Board's Order.

DCPS filed a response to the Motion denying that it has violated the Board's Order. As a result, DCPS has requested that the Board deny the Complainant's Motion. AFSCME's Motion is before the Board for disposition.

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Motion for Compliance and Enforcement
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II. Discussion

On December 20, 2002, Arbitrator Donald Wasserman issued an award which rescinded the termination of Ms. Davette Butler. Pursuant to the arbitrator's award, Ms. Butler's termination was rescinded and she was to be reinstated "as soon as possible." (Award at p. 14). In addition, the Arbitrator indicated that "DCPS must not permit [Ms. Butler's] health insurance coverage to lapse as a result of COBRA expiring." (Award at p. 14). However, as of March 2003, Ms. Butler had not been reinstated. Also, Ms. Butler's insurance was allowed to lapse on March 1, 2003. (Compl. at p. 4.)

In view of the above, AFSCME filed an unfair labor practice complaint and a request for preliminary relief. AFSCME asked the Board to grant its request for preliminary relief. Also, AFSCME requested that the Board order DCPS to: (1) comply with the terms of the award; (2) pay attorney fees and costs; (3) cease and desist from violating the Comprehensive Merit Personnel Act ("CMPA"); and (4) post a Notice.

DCPS did not dispute the factual allegations underlying the asserted statutory violation. Therefore, pursuant to Board Rule 520.10, the Board concluded that this case could be decided on the pleadings.

After reviewing the pleadings, the Board found that DCPS' reasons for failing to implement the terms of the arbitrator's award did not constitute a genuine dispute over the terms of the award. Furthermore, the Board noted that DCPS waived its right to appeal the award by failing to file either a timely arbitration review request with the Board or a petition for review with the District of Columbia Superior Court. In view of the above, the Board determined that DCPS did not have a "legitimate reason" for its on-going refusal to implement the award. Therefore, in Slip Opinion No. 712 (issued May 16, 2003), the Board concluded that DCPS' actions constituted a violation of its duty to bargain in good faith, as codified under D.C. Code § 1-617.04(a)(5) (2001 ed.). In addition, the Board found that these same acts and conduct, constituted interference with bargaining unit employees' rights, in violation of D.C. Code § 1-617.04(a)(1) (2001 ed.).

The Board's Order (issued on May 16, 2003) provided, among other things, that the arbitration award be fully implemented. In addition, the Board directed that any disputes related to Ms. Butler's proper placement, should be referred to Arbitrator Donald Wasserman.

In their Motion, AFSCME claims that DCPS has failed to comply with the Board's May 16th Order. Specifically, AFSCME argues that it has been three months since the Board issued Slip Opinion No. 712. However, to date, Ms. Butler has not received her backpay. AFSCME asserts that DCPS' failure to provide Ms. Butler with backpay, has created a huge financial burden on Ms. Butler's family. (Motion at p.3).

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In view of the above, AFSCME is asking the Board to: (1) find that DCPS has failed to comply with the Board's Order and (2) bring an enforcement action in the District of Columbia Superior Court to compel DCPS to comply with the Board's Order. The Complainant's Motion is before the Board for disposition.

The parties agree that DCPS has not provided Ms. Butler with backpay. As a result, the Board must determine if DCPS' action is reasonable.

In the present case, the arbitrator's award was issued in December 2002 and the Board's Order directing that DCPS comply with the award was issued in May 2003. In light of the above, it has been nine months since the arbitrator's award was issued and four months since our Order was issued. However, to date, DCPS has not provided Ms. Butler with backpay. Furthermore, DCPS has failed to provide a legitimate and convincing explanation concerning their failure to provide Ms. Butler with her backpay. As a result, we are inclined to grant AFSCME's Motion. However, we will hold this matter in abeyance for thirty (30) days in order to allow DCPS to submit proof of compliance. At the expiration of the thirty (30) day period, we will again consider AFSCME's Motion.

ORDER

IT IS HEREBY ORDERED THAT:

1. This matter will be held in abeyance for thirty days.
2. Within thirty (30) days from the issuance of this Decision and Order, the District of Columbia Public Schools shall provide proof to the Public Employee Relations Board, that the Grievant Davette Butler has received her backpay.
3. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

**BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.**

September 30, 2003

**Government of the District of Columbia
Public Employee Relations Board**

In the Matter of:

District of Columbia

Metropolitan Police Department,

Petitioner,

and

Fraternal Order of Police/Metropolitan

Police Department Labor Committee

(on behalf of Grievant, Angela Fisher),

Respondent.

PERB Case No. 02-A-07

Opinion No. 738

FOR PUBLICATION

DECISION AND ORDER

The District of Columbia Metropolitan Police Department ("MPD" or "Agency") filed an Arbitration Review Request (Request) in the above captioned matter. MPD seeks review of an arbitration award (Award) which rescinded a termination action that had been imposed on a bargaining unit employee. MPD contends that the: (1) Arbitrator was without authority to grant the Award; and (2) Award is contrary to law and public policy. The Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP" or "Union") opposes the Request.

The issue before the Board is whether "the award on its face is contrary to law and public policy" or whether "the arbitrator was without or exceeded his or her jurisdiction. . . ." D.C. Code Sec. 1-605.02(6).¹ Upon consideration of the Request, we find that MPD has not established a statutory basis for our review. Therefore, pursuant to Board Rule 538.4, MPD's request for review is denied.

MPD terminated the Grievant, a former Master Patrol Officer, for alleged misconduct as a result of a physical altercation that she had with her teenage niece at a Prince Georges' County, Maryland shopping mall. As a result of the incident, criminal charges were filed. However, Prince Georges' County did not pursue the matter further once the trial ended in a hung jury. Nevertheless, MPD decided to pursue a termination action based on their view that Officer Fisher engaged in police misconduct which violated several of the Agency's rules and regulations. The Police Trial

¹Throughout this Opinion, all references to the D.C. Code will refer to the 2001 edition.

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Board convened a hearing concerning the matter which lasted over 600 ²days. At the conclusion of the Trial Board's hearing, the Chief of Police's termination action was sustained. FOP appealed this matter at Arbitration. The Arbitrator determined that the Grievant's termination was in violation of the procedural rights guaranteed to him by the parties' collective bargaining agreement (CBA). Specifically, the Arbitrator concluded that MPD violated Article 12, Section 6 of the parties' CBA when it failed to issue a written decision within the fifty- five (55) day time limit. In addition, the Arbitrator determined that MPD violated the Grievant's procedural due process rights by failing to allow the Grievant's counsel to fully cross examine several key witnesses in the matter. As a result, the Arbitrator rescinded the termination and ordered that the Grievant be reinstated with full back pay and benefits.

MPD takes issue with the Arbitrator's Award. Specifically, MPD asserts that the: (1) Award is contrary to law and public policy and (2) Arbitrator was without authority to grant the Award. Specifically, MPD asserts that it did not violate the 55-day rule and asserts that the Arbitrator miscalculated the 55-day time limit.³ Furthermore, MPD asserts that assuming without admitting that the 55-day rule was violated, the procedural violation was harmless and the Arbitrator's decision should be reversed.⁴ In response to the arbitrator's ruling that MPD violated Officer Fisher's due

² Based on our review of the delay issue in this case, it appears that MPD and the Trial Board did not treat this matter with any urgency. In fact, five (5) of the continuances were either requested by the Employer or granted *sua sponte* by the Trial Board. The reasons given for the continuance requests vary. The reasons given involved, *inter alia*, (1) witness availability; (2) scheduling issues and (3) the need for time to secure other evidence. Based on the record, it appears that the Grievant only requested one continuance in order that Grievant's counsel could attend a funeral. The Arbitrator mentioned the Grievant's single continuance request in his Opinion and Award and concluded that it had not been shown that this delay accounted for more than a day or two, a period of little significance under these facts. Therefore, the Board finds reasonable the Arbitrator's determination that this time lapse was beyond what the parties' CBA allowed.

³MPD asserts that the counting should begin with the days between the commencement of the hearing and the 1st continuance that MPD requested. By its calculation, that time period was 29 days. Then, MPD asserts that the counting should resume after the record of the hearing closed. MPD contends that 20 days elapsed between the closing of the record and the issuance of the decision. Therefore, by MPD's calculations, it only took the Agency 49 days to issue the decision.

⁴MPD relies on a D.C. Superior Court decision involving a review of another Arbitrator's Award concerning MPD Police Officer, Anthony Brown. See, Metropolitan Police Department v. District of Columbia Public Employee Relations Board 01 MPA 19 (2002); MPD v. FOP (on behalf of Officer Anthony Brown), 48 DCR 10985, Slip Op. No. 662, PERB Case No. 01-A-05 (2001). In that case, the Superior Court reviewed a Decision of the Board concerning the effect of procedural time limits and reversed the Board's decision. *Id.* The Court concluded, *inter alia*, that even though the Employer had not complied with the 15-day rule, it was mere harmless error

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process rights by failing to allow the complete testimony of several key witnesses, MPD asserts that limiting the cross examination of those witnesses was harmless error which did not justify a reversal of the discipline. MPD also asserts that it was not allowed to brief the due process arguments raised by FOP.⁵ Therefore, MPD contends that the Arbitrator exceeded his authority by dismissing the charges against Officer Fisher.

FOP opposes MPD's Arbitration Review Request and asserts that MPD fails to state a basis for review. Specifically, FOP asserts that the Arbitrator had the authority to remedy procedural violations and provide an appropriate remedy for the due process violation because it was harmful error. As a result, FOP contends that there is no grounds for reversal of the Arbitrator's decision.⁶

In light of the above, MPD's ground for review only involves a disagreement with the Arbitrator's interpretation of Article 12, Section 6 of the parties' CBA. In addition, MPD merely requests that we adopt its interpretation of the above referenced CBA provision. Moreover, MPD suggests that we adopt its view that the Grievant's procedural due process rights were not violated

which did not deprive Officer Brown of due process or affect the decision to terminate him. See, Id. In addition, the Superior Court opined that the error did not warrant reversal of MPD's termination action. As a result, the Superior Court remanded the case to the Board and ordered that the Board issue an Order reversing the Arbitrator's decision and ordering MPD to reinstate the termination action. MPD v. DCPERB, 01 MPA 19 (2002).

⁵Based on information submitted to the Board by the parties, it is clear is that MPD had notice of this due process argument well before the Arbitration phase ended. In a letter sent by FOP's representative to Chief Ramsey requesting that he overturn the Trial Board's decision, FOP makes the same due process arguments concerning the failure to cross examine witnesses and the 55-day rule that it made at the arbitration stage in its brief. Therefore, we find that MPD cannot claim unfair surprise by the issue and should have known that this issue was one that it should have briefed. Therefore, we find that this argument as no merit.

⁶To refute MPD's position, FOP relies on another D.C. Superior Court case where the Court reached an opposite result. Metropolitan Police Department v. Public Employee Relations Board, 01-MPA-18 (2002). Specifically, the Superior Court upheld the Board's decision to deny MPD's Arbitration Review Request involving Officer Vernon Gudger. Metropolitan Police Department v. Public Employee Relations Board, 01-MPA-18 (2002). MPD v. FOP/MPDLC (on behalf of Vernon Gudger), 49 DCR 10989, Slip Op. No. 663, PERB Case No. 01-A-08 (2001). In this matter, the Arbitrator dismissed the disciplinary action against Officer Gudger based on a 15-day rule violation. Id. Without addressing the issue of whether a harmful error was committed, the Board observed that Arbitrators have broad authority to grant remedies for contract violations. Id. In addition, the Board relied on its holding that the parties' bargain for the Arbitrator's interpretation of their collective bargaining agreement and the Board will not substitute its interpretation for that of the duly designated Arbitrator. Id. Finally, the Board concluded that the Arbitrator's decision was based on a thorough analysis and could not be said to be contrary to law or public policy, nor did the Arbitrator exceed his authority. Id. The Superior Court affirmed the Board's decision in this matter. Id.

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by failing to allow her counsel to cross examine MPD's witnesses concerning their adverse testimony in this case.

Based on the above and the Board's statutory basis for reviewing arbitration awards, MPD contends that the Arbitrator exceeded her authority. We disagree.

We have held that an arbitrator's authority is derived "from the parties' agreement and any applicable statutory and regulatory provision." D.C. Dept. of Public Works and AFSCME, Local 2091, 35 DCR 8186, Slip Op. No. 194, PERB Case No. 87-A-08 (1988). Furthermore, we have determined that an arbitrator does not exceed his authority by exercising his equitable power, unless it is expressly restricted by the parties' collective bargaining agreement. See, D.C. Metropolitan Police Department and FOP/MPD Labor Committee, 39 DCR 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992). In the present case, MPD does not cite any provision of the CBA which limits the Arbitrator's equitable power.⁷ Therefore, the Arbitrator had the authority to rescind the discipline imposed on the Grievant due to MPD's failure to comply with procedural rights guaranteed to the Grievant by the CBA.

In addition, we have held that "[b]y agreeing to submit the settlement of [a] grievance to arbitration, it [is] the Arbitrator's interpretation, not the Board's, that the parties have bargained for." University of the District of Columbia and University of the District of Columbia Faculty Association/NEA, 39 DCR 9628, Slip Op. No. 320 at p.2, PERB Case No. 92-A-04 (1992). Also, we have found that by submitting a matter to arbitration, "the parties agree to be bound by the Arbitrator's interpretation of the parties agreement and related rules and regulations as well as his evidentiary findings and conclusions upon which the decision is based." Id. Moreover, "[t]he Board will not substitute its own interpretation or that of the Agency's for that of the duly designated arbitrator." District of Columbia Department of Corrections and International Brotherhood of Teamsters, Local Union No. 246, 34 DCR 3616, Slip Op. No. 157 at p. 3, PERB Case No. 87-A-02 (1987). Therefore, MPD's claim that the Arbitrator was without authority to grant the Award is without merit.

MPD also claims that the Arbitrator's Award is contrary to law and public policy. We have held that a "disagreement with the arbitrator's interpretation. . . does not make the award contrary to law and public policy." AFGE, Local 1975 and Dept. of Public Works, Slip Op. No. 413, PERB Case No. 95-A-02 (1995). To set aside an award as contrary to law and public policy, the Petitioner must present applicable law and definite public policy that mandates that the arbitrator arrive at a different result. See, AFGE, Local 631 and Dept. of Public Works, 45 DCR 6617, Slip Op. No. 365, PERB Case No. 93-A-03 (1993). In the present case, MPD's claims involve only a disagreement with the Arbitrator's interpretation of Article 12, Section 6 of the CBA and his determination that the Grievant's due process rights were violated by failing to allow her counsel to fully cross examine key witnesses in the Trial Board's case. Moreover, MPD's public policy argument does not rely on a well-defined policy or legal precedent. Thus, MPD has failed to point to any clear or legal public policy which the Award contravenes.

⁷We note that if the parties' collective bargaining agreement limited the Arbitrator's discretion concerning penalties, that limitation would be enforced.

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Finally, we have considered arguments where MPD asserted that the Arbitrator's application of the 55-day rule and subsequent reversal of discipline imposed was contrary to law. See, District of Columbia Metropolitan Police Department v. Fraternal Order of Police, Metropolitan Police Department Labor Committee (on behalf of Grievant Charles Sims), 47 DCR 5313, Slip Op No. 625, PERB Case No. 00-A-01 (2000); See also, District of Columbia Metropolitan Police Department and The Fraternal Order of Police, Metropolitan Police Department Labor Committee (On behalf of Officer Duke Washington) ("Washington"), 31 DCR 4159, Slip Op. No. 85, PERB Case No. 84-A-05 (1984). In those cases, the Board held that a disagreement with the Arbitrator's calculation of the 55-day time limit is *not* a sufficient basis for concluding that an Award is contrary to law or public policy or that the arbitrator exceeded his jurisdiction. *Id.* As a result, we find that MPD has not articulated any reason why the present case should be decided differently than the ones noted above.

We find that the Arbitrator's conclusion is based on a thorough analysis and cannot be said to be clearly erroneous or contrary to law and public policy. In the present case, MPD disagrees with the Arbitrator's conclusion. This is not a sufficient basis for concluding that the: (1) Arbitrator has exceeded his authority; or (2) Award is contrary to law or public policy. For the reasons discussed, no statutory basis exist for setting aside the Award; the Request is therefore, denied.

ORDER**IT IS HEREBY ORDERED THAT:**

1. The Arbitration Review Request is denied.
2. The Metropolitan Police Department (MPD) is directed to reinstate Officer Angela Fisher with full back pay and benefits consistent with Arbitrator Seymour Strongin's Award, within thirty (30) days of the issuance of this Decision and Order.
3. MPD is to immediately notify the Board in writing once it has fully implemented Arbitrator Strongin's Award.
4. Pursuant to Board Rule 559.2, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

Washington, D.C.

March 5, 2004

**Government of the District of Columbia
Public Employee Relations Board**

In the Matter of:

Washington Teachers' Union, Local #6,
American Federation of Teachers, AFL-CIO,

Complainant,

v.

District of Columbia Public Schools,

Respondent.

PERB Case No. 04-U-01

Opinion No. 741

FOR PUBLICATION

DECISION AND ORDER

I. Statement of the Case:

The Washington Teachers' Union, Local #6, American Federation of Teachers, AFL-CIO, ("Complainant", "WTU" or "Union"), filed an Unfair Labor Practice Complaint and a Motion for a Decision on the Pleadings, in the above-referenced case. The Complainant alleges that the District of Columbia Public Schools ("DCPS" or "Respondent") violated D.C. Code § 1-617.04 (a)(1) and (5) (2001 ed.) by failing to implement an arbitration award which rescinded the involuntary transfer of Ronald Hershner. (Compl. at p. 2). The Complainant is asking the Board to grant their request for a decision on the pleadings and order DCPS to: (1) immediately transfer Mr. Hershner to Duke Ellington School of the Arts; (2) pay attorney fees and costs; (3) post a notice to employees; and (4) cease and desist from violating the Comprehensive Merit Personnel Act.

DCPS filed an answer to the Complaint. DCPS does not deny WTU's claim. Instead, DCPS asserts that extenuating circumstances have prevented the school system from returning Mr. Hershner to Duke Ellington School of the Arts. As a result, DCPS has requested that the Board dismiss the Complaint. In addition, DCPS filed a response opposing the Complainant's "Motion for a Decision on the Pleadings." The Complaint and WTU's motion are before the Board for disposition.

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II. Discussion

In July 2001, DCPS involuntarily transferred nine teachers, including math teacher Ronald Hershner, from their positions at Duke Ellington School of the Arts ("Ellington"). WTU filed a grievance concerning these transfers. On September 21, 2002, Arbitrator Marvin Johnson issued an award. The Arbitrator found that four of the nine teachers had been involuntarily transferred in violation of the parties' collective bargaining agreement. With regard to Mr. Hershner, the Arbitrator concluded that "DCPS involuntarily transferred Mr. Hershner for reasons of discipline and performance in violation of the parties' agreement." (Award at p. 34). In view of the above, the Arbitrator ordered that "Ms. Johnson, Ms. Coleman, Mr. Hershner and Mr. Harris ... be offered the option of being transferred back to Ellington for the 2002-2003 school year." (Award at p. 38). Three of these individuals, including Mr. Hershner, opted to return to Ellington. On December 16, 2002, two of these teachers were returned to Ellington. However, to date, Mr. Hershner has not been returned to Ellington. Instead, Mr. Hershner remains at Woodrow Wilson Senior High School, where he was involuntarily transferred in 2001. (Compl. at p. 2).

WTU asserts that DCPS' failure to implement the arbitration award constitutes a violation of D.C. Code § 1-617.04(a)(1) and (5) (2001 ed.).¹ As a result, WTU filed an unfair labor practice complaint. Also, WTU claims that DCPS acknowledges that they have failed to implement the award. Therefore, WTU is requesting that the Board issue a decision on the pleadings. Furthermore, WTU is requesting that the Board order DCPS to: (1) comply with the terms of the award; (2) pay attorney fees and costs; (3) cease and desist from violating the Comprehensive Merit Personnel Act ("CMPA"); and (4) post a Notice.

DCPS filed an answer to the unfair labor practice complaint denying that it violated the CMPA. In addition, DCPS filed a response opposing the Complainant's "Motion for a Decision on the Pleadings."

DCPS does not dispute the factual allegations underlying the asserted statutory violation. Instead, DCPS claims that "the Complainant's unfair labor practice complaint should be dismissed because the Complainant fails to state an unfair labor practice for which relief [can] be granted." (Answer at p. 4) [Furthermore, DCPS asserts that it] has complied with the Arbitrator's Award.

¹D.C. Code § 1-617.04(a)(1) and (5) provide as follows:

(a) The District, its agents, and representatives are prohibited from:

(1) Interfering, restraining, or coercing any employee in the exercise of the rights guaranteed by this subchapter;

• • •

(5) Refusing to bargain collectively in good faith with the exclusive representative.

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[DCPS contends that] the teachers were given the option of returning to Duke Ellington. [Consistent with the award, DCPS claims that] three teachers opted to return to Duke Ellington and two were returned. [However,] Mr. Hershner was not returned due to extenuating circumstances and reasons unrelated to the Duke Ellington Arbitration Decision and Award. [Specifically,] DCPS contends that after the award was issued, a parent came forward alleging that Mr. Hershner had an inappropriate relationship with her daughter while she was attending Duke Ellington during the 1999-2000 school year." (Answer at p. 4). Also, DCPS claims that "the [complaining] parent has a younger daughter who currently attends [Ellington]. [In addition, the parent] has expressed concerns for the younger daughter. [In light of the above,] the parent does not want Mr. Hershner to return to Ellington." (DCPS' Response to Motion at p. 2). For the above-noted reasons, DCPS is requesting that the complaint be dismissed.

After reviewing the pleadings, we believe that the material issues of fact and supporting documentary evidence are undisputed by the parties. As a result, the alleged violations do not turn on disputed material issues of fact, but rather on a question of law. Therefore, pursuant to Board Rule 520.10, this case can appropriately be decided on the pleadings.

The Board has previously considered the question of whether the failure to implement an arbitrator's award constitutes an unfair labor practice. In American Federation of Government Employees, Local 872, AFL-CIO v. D.C. Water and Sewer Authority, 46 DCR 4398, Slip Op. No. 497, PERB Case No. 96-U-23 (1996), the Board held for the first time that "when a party simply refuses or fails to implement an award or negotiated agreement where no dispute exists over its terms, such conduct constitutes a failure to bargain in good faith and, thereby, an unfair labor practice under the CMPA." Slip Op. at p. 3. In addition, the Board has noted that an agency waives its right to appeal an arbitration award when it fails to file: (1) a timely arbitration review request with the Board; and (2) for judicial review of the award, pursuant to D.C. Code § 1-617.13 (c) (2001 ed.). See, AFGE, Local 2725 v. D.C. Housing Authority, 46 DCR 6278, Slip Op. No. 585 at p. 5, PERB Case Nos. 98-U-20, 99-U-05 and 99-U-12 (1999). Furthermore, the Board has determined that if an agency waives its right to appeal an arbitration award, "no legitimate reason exists for [the agency's] on-going refusal to implement the award and . . . [the agency's] refusal to do so [constitutes] a failure to bargain in good faith in violation of D.C. Code § 1-617.04 (a)(1) and (5)." American Federation of Government Employees, Local 2725 v. D.C. Housing Authority, 46 DCR 8356, Slip Op. No. 597 at p. 2, PERB Case No. 99-U-23 (1999).

In the present case, DCPS acknowledges that the September 21, 2002 arbitration award has not been fully implemented. Specifically, DCPS contends that Ms. Johnson, Ms. Coleman, and Mr. Harris were offered the option to return to Ellington. Furthermore, Mr. Harris and Ms. Johnson were returned to Ellington in December 2002.² However, DCPS claims that extenuating circumstances have prevented the school system from returning Mr. Hershner to Ellington. Specifically, on November 4, 2002, a parent came forward alleging that during the 1999-2000 school year, Mr. Hershner had an inappropriate relationship with her daughter while she was attending Ellington. DCPS claims that the student alleged that Mr. Hershner would ask her to go for walks in the park

²Ms. Coleman declined the offer to return to Ellington.

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and that he took her to Starbucks during school hours. (Answer at p. 4) In addition, the student alleged that Mr. Hershner: (1) made a comment about how good her body was; (2) took pictures of her while she was in class; and (3) gave her a book in which he wrote his e-mail address, home telephone number and home address. (Answer at p. 4) Also, DCPS contends that after Mr. Hershner was transferred to Woodrow Wilson Senior High School, he attended all of the student's recitals and showed up at her prom and approached her. (Answer at p. 4) The student has graduated from Duke Ellington; however, she claims that Mr. Hershner continues to attempt to contact her. For example, it is alleged that Mr. Hershner sent her an e-mail while she was at the University of North Carolina. (Answer at p. 4).

DCPS claims that its EEO office conducted an investigation and found that Mr. Hershner had acted inappropriately toward the student. DCPS contends that based on these findings, it was determined that Mr. Hershner would not be returned to Duke Ellington. (DCPS' Response to Motion at p. 4) Furthermore, DCPS asserts that as the government agency charged with the care, safety, and academic growth of children, it has a duty to its students. Specifically, DCPS claims that it has a responsibility to reduce the risk of exposing children to potential harm. Also, DCPS contends that the parent stated that she does not want Mr. Hershner returned to Ellington because she has another daughter currently attending the school. In addition, DCPS asserts that the parent is concerned that Mr. Hershner might try to use her younger daughter to get to her other daughter. In view of the above, DCPS is requesting that the Complainant's unfair labor practice complaint be dismissed for failure to state a claim upon which relief can be granted.

After reviewing DCPS' arguments, we recognize the sensitive nature of the current situation. Unfortunately, the allegations concerning Mr. Hershner's improper conduct occurred after the award was issued. As a result, we believe that DCPS' reasons for failing to implement the terms of the award do not constitute a genuine dispute over the terms of the September 21, 2002 award. Furthermore, DCPS has waived its right to appeal the arbitration award by failing to file either a timely arbitration review request with the Board or a petition for review with the D.C. Superior Court. As a result, the Board opines that DCPS has no "legitimate reason" for its on-going refusal to implement the award. As such, we conclude that DCPS' actions constitute a violation of its duty to bargain in good faith, as codified under D.C. Code § 1-617.04(a)(5) (2001 ed.). Furthermore, we find that by these same acts and conduct, DCPS' failure to bargain in good faith with WTU constitute, derivatively, interference with bargaining unit employees' rights in violation of D.C. Code § 1-617.04(a)(1) (2001 ed.). See, Committee of Interns and Residents v. D.C. General Hospital, 43 DCR 1490, Slip Op. No. 456, PERB Case No. 95-U-01.

Concerning the Complainant's request for attorney fees, the Board has held that D.C. Code § 1-617.13 does not authorize it to award attorney fees. See, e.g., International Brotherhood of Police Officers, Local 1446, AFL-CIO/CLC v. District of Columbia General Hospital, 39 DCR 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1992). Therefore, the Complainant's request for attorney fees is denied. See, University of the District of Columbia Faculty Association, NEA v. University of the District of Columbia, 38 DCR 2463, Slip Op. No. 272, PERB Case No. 90-U-10 (1991).

As to the Complainant's request for reasonable costs, the Board first addressed the circumstances under which the awarding of costs to a party may be warranted in AFSCME, D.C.

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Council 20, Local 2776 v. D.C. Dept. of Finance and Revenue, 37 DCR 5658, Slip Op. No. 245, PERB Case No. 89-U-02 (1990). In that case the Board observed:

Just what characteristics of a case will warrant the finding that an award of costs will be in the interest of justice cannot be exhaustively catalogued. We do not believe it possible to elaborate in any one case a complete set of rules or earmarks to govern all cases, nor would it be wise to rule out such awards in circumstances that we cannot foresee. What we can say here is that among the situations in which such an award is appropriate are those in which the losing party's claim or position was wholly without merit, those in which the successfully challenged action was undertaken in bad faith, and those in which a reasonably foreseeable result of the successfully challenged conduct is the undermining of the union among the employees for whom it is the exclusive bargaining representative. Slip Op. No. 245, at p.5.

In cases which involve an agency's failure to implement an arbitration award, the Board has been reluctant to award costs. See, AFGE, Local 2725 v. D.C. Housing Authority, 46 DCR 6278, Slip Op. No. 585 at p. 5, PERB Case Nos. 98-U-20, 99-U-05 and 99-U-12 (1999). However, the Board has awarded costs when an agency has demonstrated a pattern and practice of refusing to implement arbitration awards. See, AFGE, Local 2725 v. D.C. Housing Authority, 46 DCR 8356, Slip Op. No. 597, PERB Case No. 99-U-33 (1991).

In the present case, the Complainant has not asserted that DCPS has engaged in a pattern and practice of refusing to implement arbitration awards. As a result, we believe that the interest-of-justice criteria articulated in the AFSCME case, would not be served by granting the Complainant's request for reasonable costs. Therefore, we deny the Complainant's request for reasonable costs.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Washington Teachers' Union (WTU), Local #6, American Federation of Teachers (WTU), "Motion for a Decision on the Pleadings," is granted.
2. The District of Columbia Public Schools' (DCPS) request that the complaint be dismissed is denied.
3. DCPS, its agents and representatives shall cease and desist from refusing to bargain in good faith with WTU by failing to implement the September 21, 2002 arbitration award rendered pursuant to the negotiated provisions of the parties' collective bargaining agreement.
4. DCPS, its agents and representatives shall cease and desist from interfering, restraining or coercing its employees by engaging in acts and conduct that abrogate employees' rights guaranteed by "Subchapter XVIII. Labor-Management Relations" of the Comprehensive

Merit Personnel Act (CMPA), to bargain collectively through representatives of their own

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choosing.

5. DCPS shall, in accordance with the terms of the award, fully implement, forthwith, the arbitration award.
6. WTU's request for costs and attorney fees are denied for the reasons stated in this Opinion.
7. DCPS shall post conspicuously, within ten (10) days from the service of this Decision and Order, the attached Notice. The Notice shall be posted where notices to bargaining unit employees are customarily posted. The Notice shall remain posted for thirty (30) consecutive days.
8. Within fourteen (14) days from the issuance of this Decision and Order, DCPS shall notify the Public Employee Relations Board ("PERB"), in writing, that the Notice has been posted. Also, DCPS shall notify PERB of the steps it has taken to comply with paragraphs 5 and 7 of this Order.
9. Pursuant to Board Rule 559.2, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC RELATIONS BOARD
Washington, D.C.

March 12, 2004

APR 23 2004



Public
Employee
Relations
Board

Government of the
District of Columbia



415 Twelfth Street, N.W.
Washington, D.C. 20004
[202] 727-1822/23
Fax: [202] 727-9116

NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS, THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 741, PERB CASE NO. 04-U-01 (February 27, 2004)

WE HEREBY NOTIFY our employees that the District of Columbia Public Employee Relations Board has found that we violated the law and has ordered us to post this notice.

WE WILL cease and desist from violating D.C. Code § 1-617.04(a)(1) and (5) by the actions and conduct set forth in Slip Opinion No. 741.

WE WILL cease and desist from refusing to bargain in good faith with the Washington Teachers' Union, Local #6, American Federation of Teachers, by failing to implement arbitration awards rendered pursuant to the negotiated provisions of the parties' collective bargaining agreement over which no genuine dispute exists over the terms.

WE WILL NOT, in any like or related manner, interfere, restrain or coerce, employees in their exercise of rights guaranteed by the Labor-Management subchapter of the District of Columbia Comprehensive Merit Personnel Act.

District of Columbia Public Schools

Date: _____

By: _____
Superintendent

This Notice must remain posted for thirty (30) consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, whose address is: 717 14th Street, N.W., Suite 1150, Washington, D.C. 20005. Phone: (202) 727-1822.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.
February 27, 2004

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD**

In the Matter of:

INTERNATIONAL ASSOCIATION OF
FIREFIGHTERS, LOCAL 36,

Petitioner,

v.

DISTRICT OF COLUMBIA
DEPARTMENT OF FIRE AND EMERGENCY
MEDICAL SERVICES,

Respondent.

PERB Case No. 04-N-02

Opinion No. 742

FOR PUBLICATION

DECISION AND ORDER

This matter involves a Negotiability Appeal (Appeal) filed by the International Association of Firefighters, Local 36¹ ("IAFF" or "Union") against the District of Columbia Department of Fire and Emergency Medical Services ("FEMS" or "Agency"). This Appeal concerns the negotiability of the Union's proposal concerning the composition of the Agency's Disciplinary Trial Board², a non-compensation matter.³ In a written response to IAFF's proposal, FEMS declared the proposal

¹The International Association of Firefighters, Local 36 represents all uniformed members of the Fire and Emergency Services Department in the ranks of Firefighter through Captain.

²The Disciplinary Trial Board is currently established through a Memorandum of Understanding between the parties that was executed in 1988 and attached to the Appeal as Exhibit 5. Under the Agreement, the Trial Board consists of two bargaining unit captains and a battalion chief, all chosen by the current Fire Chief. (Exhibit 5).

³IAFF and FEMS are engaged in negotiations for new collective bargaining agreements covering non-compensation and compensation matters.

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non-negotiable.⁴ As a result, IAFF filed this Appeal. Instead of seeking a definitive ruling from the Board on whether the proposal is negotiable, as is customarily requested in these types of Appeals, the Petitioner is requesting that the Board allow the parties to brief the issue of whether the proposal is negotiable.⁵

Under the challenged provision of IAFF's proposal, Article 44-"Disciplinary Procedures", the Fire Chief would select a Trial Board composed of one uniformed officer and two captains. This three-member Trial Board would determine the appropriate disciplinary action to be taken in cases where the penalty would be termination, demotion, or a 120-hour or more suspension.⁶

FEMS asserts that §§ 6(a) and (b) of the Union's proposed Article 44, entitled "Disciplinary

⁴FEMS made its declaration of non-negotiability, through its representative, the Office of Labor Relations and Collective Bargaining (OLRCB), in its Final Outstanding Working Conditions Proposals dated December 31, 2003.

⁵IAFF bases its request for briefing on Board Rule No. 532.4(b).

⁶ Article 44, §§6(a)(b)- Disciplinary Procedures

Section 6: Trial Board

All cases in which an employee is charged with an infraction for which the penalty that may be imposed is termination, demotion, or a 120-hour suspension or greater shall be submitted to a Trial Board. The previously established procedures applicable to Trial Boards shall continue to be followed, with the following amendments:

(a) Each Trial Board shall consist of one (1) uniformed member of the Department designated by the Fire Chief and two (2) Captains selected by the Fire Chief.

(b) Except as otherwise provided in this section, the Fire Chief shall have complete discretion in selecting the members of the Trial Board and in determining the length of time that appointees serve on Trial Boards, subject to the right of an affected employee to challenge any member of the Trial Board pursuant to Article VII, § 12 of the Department's Rules and Regulations.

(Appeal Exhibit 2)

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Procedures⁷, are non-negotiable pursuant to D.C. Code §1-617.08 (a)(2), the management rights provision of the Comprehensive Merit Personnel Act (CMPA) which concerns discipline.⁸ In addition, FEMS argues that these sections of Article 44 should be deemed non-negotiable because of their effect. Namely, FEMS asserts that the Agency is restricted from imposing a higher level of discipline against a bargaining unit employees if the two bargaining unit employees (on the Trial Board) issue a lesser form of discipline. Furthermore, FEMS asserts that these sections should be deemed non-negotiable because the Agency is prevented from imposing any manner of discipline if the two (2) bargaining unit captains on the Trial Board recommend a dismissal of charges against the bargaining unit member. Finally, FEMS requests to brief the issue of negotiability in detail, only if the Board does not declare the proposal non-negotiable on its face.

In its appeal, IAFF does not state an official position on whether the challenged provision of the proposal is negotiable.⁹ Rather, it seeks to have the Board order the parties to brief the issue of negotiability.¹⁰

⁷The language in the current Memorandum of Understanding provides that the Trial Board "shall consist of one Battalion Fire Chief and two Captains." (See Exhibit 5 at §6a). This language is slightly different than the language proposed in Article 44.

When FEMS indicated its unwillingness to accept the Union's Proposal for Article 44, the Appeal suggests that the Union then decided to propose that the language embodied in the current Memorandum and its Proposal of August 14, 2003, be accepted. (See, Appeal at pg. 3).

⁸Specifically, FEMS contends that the Union's proposal interferes with management's exclusive right to discipline employees because two members of the Trial Board are bargaining unit captains and only one is a management official.

⁹Despite the fact that IAFF does not make a specific claim that the proposal is negotiable, the Board can infer that this is their position based on the fact that it urges the Board not to adopt the Department's view on this issue.

¹⁰The Union also contends that historically, the Trial Board has been made up of two captains and a battalion chief and should remain that way. In addition, IAFF asserts that if the Board finds that this proposal is non-negotiable, and agrees with the Department's new position that the Fire Chief is free to place whomever he wants on the Board, the Trial Board would become an instrumentality of the Fire Chief. Furthermore, IAFF points to the fact that FEMS's proposed composition of the Trial Board would affect the morale of the uniformed members. Furthermore, IAFF notes that FEMS has not cited any case law in support of its position of non-negotiability. As a result, IAFF recommends that the Board order the parties to brief the issues concerning their position on negotiability.

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The Board has the authority to consider the negotiability of proposals pursuant to Board Rules 532.1 and 532.4.¹¹

The specific issue presented in this Negotiability Appeal concerns whether the Petitioner's proposal, which sets forth the composition of a Disciplinary Trial Board, is negotiable.

As the Board considers this issue, it is guided by the following Board precedent:

D.C. Code §1-617.08(b)(2001 ed.) provides that "all matters shall be deemed negotiable, except those that are proscribed by this subchapter." As a result, there is a presumption of negotiability. However, the Board has stated that "in view of specific rights reserved solely to management under this same provision, i.e. D.C. Code §1-617.08 (a), the Board must be careful in assessing proffered broad interpretations of either subsection (a) or (b)." Washington Teachers' Union v. District of Columbia Public Schools, 46 DCR 8090, Slip Op. No. 450 at p.4, PERB Case No. 95-N-01 (1999).

The Board has also held that D.C. Code §1-617.08 (a)(2) provides as a sole management prerogative, the right to "suspend, demote, discharge, or take other *disciplinary* action against employees for cause." Washington Teacher's Union and D.C. Public Schools, 46 DCR 8090, Slip Op. No. 450 at pg. 11, PERB Case No. 95-N-01 (1995). However, the Board has also held that *procedural* matters concerning *discipline* are negotiable. See, Washington Teacher's Union and D.C. Public Schools, 46 DCR 8090, Slip Op. No. 450 at pg. 12, PERB Case No. 95-N-01 (1995).

Given the Board precedent noted above, and the state of the pleadings submitted by the parties, we believe that there is still insufficient information upon which to make a ruling as a matter of law.¹² Therefore, pursuant to Board Rule 532.4 (b), we are requesting that the parties submit

¹¹Board Rule 532.4 outlines the Board's options for resolving a Negotiability Appeal once it is filed. This rule provides, in pertinent part, that the Board may: (1) issue a decision on the Appeal; (2) order the submission of written briefs and/or oral arguments; (3) order a hearing, which may include briefs and arguments; or (4) direct the parties to an informal mediation or conference concerning the issue.

¹²On February 23, 2004, the Board met and considered this Appeal at its regular meeting.

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briefs¹³ in support of their respective positions on the narrowly tailored issue that follows:

In light of the parties' past practice concerning Disciplinary Trial Boards and the Board's precedent that procedural matters concerning discipline are negotiable, should this proposal be treated as non-negotiable? We are asking that you cite specific authority to support your position and explain your position on this issue thoroughly.

The parties' briefs should satisfy the requirements of Board Rule 532.

The briefs will provide both parties with an equal opportunity to present their views on the issue. Moreover, it will provide the Board with sufficient information upon which to make a determination.

ORDER

IT IS HEREBY ORDERED THAT:

¹³ In the present case, both parties requested to submit briefs concerning the negotiability issue in their initial pleadings. We note for the record that Board Rule 532.4(b) does not convey an automatic right to brief an issue raised in a negotiability appeal before the Board rules on it, simply because a party requests briefing. Therefore, in the future, the Board strongly urges the parties to thoroughly brief all issues that they consider relevant in their initial pleadings. This will expedite the resolution of these Negotiability Appeals.

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1. The parties shall submit briefs concerning this matter on an expedited basis. The briefs shall be filed seven (7) days from the service of this Decision and Order.
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

Washington, D.C.

March 2, 2004

DC Office of the Deputy Mayor for Public Safety and Justice
Justice Grants Administration

Public Notice of Funding Availability

District Opportunities

Byrne Formula Block Grant Program. *The DC Office of the Deputy Mayor for Public Safety and Justice/Justice Grants Administration* announces the availability of federal grant funds under the 2003 Byrne Formula Block Grant program, which includes program areas that address drug control, violent and serious crime, all aspects of criminal justice processing (including incarceration and treatment of offenders), and general improvements in Justice operations. Eligible applicants include nonprofit or local government agencies. The Request for Applications (RFA) will be available at 9:00 a.m. on Monday, April 19, 2004, and may be picked up at the front desk of the Office of the Deputy Mayor for Public Safety and Justice/Justice Grants Administration, 1350 Pennsylvania Avenue, NW, Suite 327, Washington, DC 20004. The deadline for applications is 5:00 p.m. on Friday, May 21, 2004. For more information, contact Phyllis McKinney, Program Manager, Office of the Deputy Mayor for Public Safety and Justice/Justice Grants Administration at (202) 727-1700 or phyllis.mckinney@dc.gov.

Local Law Enforcement Block Grant Program. *The DC Office of the Deputy Mayor for Public Safety and Justice/Justice Grants Administration* announces the availability of federal grant funds under the Local Law Enforcement Block Grant for 2003 for programs in the following purpose areas: 1) Support Law Enforcement; 2) Enhance Security Measures; 3) Establish or Support Drug Courts; 4) Enhance the Adjudication of Cases Involving Violent Offenders; 5) Establish Multi-jurisdictional Task Forces; 6) Establish Crime Prevention Programs; 7) Defray the Cost of Indemnification Insurance for Law Enforcement Officers. Eligible applicants include nonprofit or local government agencies. The Request for Applications (RFA) will be available at 9:00 a.m. on Monday, April 19, 2004, and may be picked up at the front desk of the Office of the Deputy Mayor for Public Safety and Justice/Justice Grants Administration, 1350 Pennsylvania Avenue, NW, Suite 327, Washington, DC 20004. The deadline for applications is 5:00 p.m. on Friday, May 21, 2004. For more information, contact Phyllis McKinney, Program Manager, Office of the Deputy Mayor for Public Safety and Justice/Justice Grants Administration at (202) 727-1700 or phyllis.mckinney@dc.gov.

Government of the District of Columbia
DC Office of the Deputy Mayor for Public Safety and Justice
Justice Grants Administration
Email: fundingalert@dc.gov

Public Notice of Funding Availability

District Opportunities

Victim Assistance Fund. *The DC Office of the Deputy Mayor for Public Safety and Justice/Justice Grants Administration* announces the availability of grant funds under the fiscal year 2005 Victim Assistance Fund. Eligible applicants are non-profit, community-based organizations located in the District of Columbia that provide direct services to crime victims. The Request for Applications (RFA) will be available at 9:00 a.m. on Monday, April 19, 2004, and may be picked up at the front desk of the Office of the Deputy Mayor for Public Safety and Justice/Justice Grants Administration, 1350 Pennsylvania Avenue, NW, Suite 327, Washington, DC 20004. The deadline for applications is 5:00 p.m. on Monday, May 21, 2004. For more information, contact Bryan Criswell, Program Manager, Office of the Deputy Mayor for Public Safety and Justice/ Justice Grants Administration at (202) 727-0957 or bryan.criswell@dc.gov.

Grants to Encourage Arrest Policies and Enforcement of Protection Orders Program. *The DC Office of the Deputy Mayor for Public Safety and Justice/Justice Grants Administration* announces the availability of federal grant funds under the 2003 Grants to Encourage Arrest Policies Enforcement of Protection Orders Program. This program enhances victim safety and offender accountability in cases of domestic violence and dating violence intervention that is part of a coordinated response. Applicants must be non-profit, non-governmental victim advocacy agencies/organizations located in the District of Columbia. The Request for Applications (RFA) will be available at 9:00 a.m. on Monday, April 19, 2004, and may be picked up at the front desk of the Office of the Deputy Mayor for Public Safety and Justice/Justice Grants Administration, 1350 Pennsylvania Avenue, NW, Suite 327, Washington, DC 20004. The deadline for applications is 5:00 p.m. on Monday, May 21, 2004. For more information, contact Bryan Criswell, Program Manager, Office of the Deputy Mayor for Public Safety and Justice/ Justice Grants Administration at (202) 727-0957 or bryan.criswell@dc.gov.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE
OFFICE OF THE SECRETARY
OF THE DISTRICT OF COLUMBIA
WASHINGTON, D.C. 20001

Final Decision

Appeal of: Michael Blasenstein

Matter No: MCU 409455

Date: April 5, 2004

Arnold R. Finlayson, Esq., Director, Office of Documents and Administrative Issuances, participated in the preparation of this decision.

I. INTRODUCTION

The above-captioned matter, commenced pursuant to section 207(a) of the District of Columbia Freedom of Information Act ("D.C.-FOIA"), D.C. Official Code § 2-537(a) (2001),¹ is before the Secretary of the District of Columbia upon Mr. Michael Blasenstein's (hereinafter the "appellant") formal administrative appeal to Mayor Anthony Williams to review the Department of Motor Vehicles'

¹ Pursuant to section 207(a) of the D.C.-FOIA, "[a]ny person denied the right to inspect a public record of a public body may petition the Mayor to review the public record to determine whether it may be withheld from public inspection." D.C. Official Code § 2-537(a) (emphasis added).

("DMV") decision to partially deny his "Freedom of Information request of December 10, 2003, as amended January 13, 2004."² Blasenstein Appeal Letter at page 1.

In the present matter, the appellant alleges that DMV's FOIA Officer improperly withheld from disclosure to him, inter alia, "an undisclosed number of Policy and Procedures Memos" regarding DMV's adjudicative hearings process based on the determination that such documents constitute "pre-decision deliberative material." Id. at pages 2-3.

II. FACTUAL AND PROCEDURAL BACKGROUND

The appellant was the driver of a motor vehicle that was involved in an accident in the District of Columbia.³ A hearing before an examiner of the DMV was initially scheduled in October, 2003 in connection with the accident. The appellant was present on the date of the initial hearing; however, the police officer who responded to the accident did not appear and the hearing examiner continued

² Pursuant to Mayor's Order 97-177, dated October 9, 1997, the Secretary of the District of Columbia was delegated the authority vested in the Mayor to render final decisions on, inter alia, appeals and petitions for review under the D.C.-FOIA.

³ The relevant facts are largely based upon the information contained in the appeal letter and accompanying attachments.

the matter until December, 2003. The continuance of the initial hearing, rather than a dismissal of the DMV proceedings, prompted the appellant to inquire as to what authority was relied upon by the hearing examiner to schedule a new hearing date.

According to the written appeal to the Mayor, in October and December 2003, the appellant, "as a result of an undisclosed adjudication policy . . . was made subject to at [sic] two DMV adjudication hearings." Id. at page 1.

The appellant alleges that the "undisclosed policy states that in cases involving an accident . . . the police automatically get a continuance if they do not appear at the first scheduled hearing." Id.

The appellant further alleges that "[t]wo DMV officials . . . justified the unwritten 'one automatic continuance' policy by citing 18 DCMR 1030.2." Id.⁴

18 DCMR § 1030.2 provides that:

If the hearing examiner believes that there is relevant and material evidence available which has not been presented at the hearing, the examiner may adjourn the hearing, or, at anytime prior to the mailing of notice of the decision, reopen the hearing for the receipt of such evidence.

After the conclusion of the second scheduled hearing

⁴ The two officials referred to are the DMV's FOIA Officer and the Chief Hearing Examiner.

which was held on December 10, 2003, the appellant alleges that he went to the Chief Hearing Examiner's office and "asked her about the 'one continuance' policy," to which she replied "that it wasn't written down anywhere to her knowledge, but if it were, it was probably in a 'Policy and Procedure Memo.'" Id.

Based on his discussion with the Chief Hearing Examiner, the appellant construed her alleged statement as an admission "that such policies do in fact exist." Id.

Following his discussion with the Chief Hearing Examiner, the appellant submitted a handwritten request, via hand delivery to DMV's FOIA Officer, which sought the disclosure of the following information:

. . . copies of any and all internal DMV documents, including Policy & Procedure Memos, that specify the policies and procedures governing the adjudication of citations within the Department. This includes any and all policies, procedures, and penalties that affect members of the public subject to an adjudicative hearing within the Department. This request requires only information not already contained in the DC Code and DCMR. This request is also made in accordance with the Freedom of Information section of the District of Columbia Code.

Handwritten letter dated 12/10/03 from M. Blasenstein to A. Irene.

Subsequently, by electronic mail ("e-mail"), dated January 13, 2004, the appellant amended his initial D.C.-FOIA request as follows:

AMENDMENT 1 (LIMITATION OF REQUEST): I hereby amend the first sentence of my original request, dated Dec. 10, 2003, to read: "Please provide me with copies of any and all internal DMV documents, including but not limited to Policy & Procedure Memos, which specify those policies and procedures governing the process of adjudication within the Department that do or may affect members of the public subject to adjudication."

AMENDMENT 2 (EXPLANATION OF DENIAL IN PART OR WHOLE): I would also like to insert the following statement above the second paragraph of my original request: "If the Department denies disclosure of any or all of the information requested by me here, I request that the Department provide me with an explanation of such denial in accordance with §2-533 of the D.C. Code."

E-mail dated January 13, 2004 from M. Blasenstein to A. Irene.

The appellant alleges that "[o]n January 22 . . . [the DMV's FOIA Officer] called [him] to say that he received my documents and would mail them right away." Appeal Letter at page 2. The appellant asserts that the DMV's FOIA Officer "also told [him] that an undisclosed number of Policy and Procedures Memos were excluded because they were 'pre-decision deliberative material.'" Id.

By letter to the appellant dated January 22, 2004, DMV's FOIA Officer "enclosed . . . three (3) documents covering the current administrative policies and hearing procedures affecting DMV's hearing process, other than what appears in the Code and Municipal Regulations." Letter dated January 22, 2004 from A. Irene to M. Blassenstein [sic].

The appellant states that "[n]o written explanation of the denial of the 'pre-decision deliberative material' was sent to [him], and the record before the Office of the Secretary reflects that the January 22, 2004 letter did not cite any D.C.-FOIA exemption(s), with a supporting explanation to justify the withholding of any responsive records from disclosure to the appellant, or otherwise indicate that any responsive documents were being withheld from disclosure. However, it appears that the DMV's FOIA Officer had reason to believe that the appellant might view the DMV's response to his D.C.-FOIA request, as amended, as being partially denied because it advised him that "[i]n the event you determine this response to be a denial, in part or in whole of you [sic] FOIA Request, you may appeal this denial to the Mayor pursuant to D.C. Office Code Section 1-537." Id. The present administrative appeal ensued.

Following a general overview of the legal principles underlying the D.C.-FOIA, this decision considers the propriety of the DMV's response to the appellant's D.C.-FOIA request.

III. DISCUSSION

A. GENERAL OVERVIEW OF THE D.C.-FOIA

The D.C.-FOIA, like the federal FOIA upon which it was

modeled, was enacted in 1976 to divest government officials of broad discretion in determining what, if any, government records should be made available to the public upon the receipt of a request for information. See Subcommittee on Administrative Practice & Procedure of the Senate Committee on Judiciary, 95th Cong., 2d. Sess., *Freedom of Information: A Compilation of State Laws* (Comm.Print 1978); see also Washington Post v. Minority Business Opportunity Commission, 560 A.2d 517, 521 (D.C. 1989). In this regard, the D.C.-FOIA was "designed to promote the disclosure of information, not inhibit it." Id.

The D.C.-FOIA embodies "[t]he public policy of the District of Columbia . . . that all persons are entitled to full and complete disclosure of information regarding the affairs of government and the official acts of those who represent them as public officials and employees." D.C. Official Code § 2-531; see Donahue v. Thomas, 618 A.2d 601, 602 n.2 (D.C. 1992); Newspapers, Inc. v. Metropolitan Police Department, 546 A.2d 990, 993 (D.C. 1988); Barry v. Washington Post Company, 529 A.2d 319, 321 (D.C. 1987).

In order to accord full force and effect to the spirit and intent of the D.C.-FOIA, officials of District of Columbia public bodies are required to construe its provisions "with the view toward expansion of public access

and the minimization of costs and time delays to persons requesting information." D.C. Official Code § 2-531; see Washington Post, 560 A.2d at 521; Newspapers, Inc., 546 A.2d at 993. Thus, the policy underlying the D.C.-FOIA favors the broad disclosure of official records in the possession, custody or control of public bodies of the government of the District of Columbia, unless such records (or portions thereof) fall squarely within the purview of one or more of the nine categories of information which are expressly exempted from the disclosure mandate. See Washington Post, supra; Newspapers, Inc., supra. The nine statutory exemptions enumerated in the D.C.-FOIA, which protect certain types of confidential and/or privileged information from disclosure, "are to be construed narrowly, with ambiguities resolved in favor of disclosure." Washington Post, supra.

B. D.C.-FOIA EXEMPTION SCHEME

Section 202(a) of the D.C.-FOIA provides that "[a]ny person has [the] right to inspect, and at his or her discretion, to copy *any public record* of a public body, *except as otherwise expressly provided by § 2-534.*" D.C. Official Code § 2-532(a) (emphasis added). Section 2-534 of the D.C. Official Code, conspicuously entitled "**Exemptions from disclosure**," in turn, enumerates the nine categories

of information which "may be exempt from disclosure under the provisions of [the D.C.-FOIA]." D.C. Official Code § 2-534(a) (1) - (9) (emphasis added).⁵

Taken together, sections 2-532(a) and 2-534 of the D.C. Official Code clearly and explicitly require the mandatory disclosure of all public records in the possession, custody or control of District public bodies, to the extent that such records (or any reasonably segregable portions thereof),⁶ do not fall within the ambit of any of the nine statutory exemptions which protect certain categories of public records from disclosure. See Barry v. Washington Post Co., 529 A.2d 319, 321 (D.C. 1987) ("The [D.C.-FOIA] provides for full disclosure unless the information requested is exempted under a specific statutory provision").

⁵ In the legal sense, the "use of the word 'may' in a statute ordinarily denotes discretion." In re Langon, 663 A.2d 1248 (D.C. 1995). Indeed, the federal FOIA has been interpreted by federal courts to permit agencies to make discretionary disclosures of records otherwise exempt under at least four of the exemptions to the federal FOIA. See Bartholdi Cable Co. v. FCC, 114 F.3d 274, 282 (D.C. Cir. 1997) ("FOIA's exemptions simply permit, but do not require, an agency to withhold exempted information").

⁶ D.C. Official Code § 2-534(b) provides, in pertinent part, that "[a]ny reasonably segregable portion of a public record shall be provided to any person requesting such record after deletion of those portions which may be withheld from disclosure under subsection (a) of this section."

C. ANALYSIS

In the present matter, the appellant questions whether the DMV has made a full disclosure of all of the documents in its possession, custody or control that are within the scope of his D.C.-FOIA request which sought internal DMV documents related to the adjudicative hearings process.

The record before the Office of the Secretary reveals that the DMV's FOIA Officer, in his written response to the appellant, neither cited any of the D.C.-FOIA's exemptions, nor indicated that any records responsive to the appellant's D.C.-FOIA request were being withheld from disclosure.

On appeal, the appellant alleges that, during a telephone conversation on January 22 with the DMV's FOIA Officer, he was advised that "an undisclosed number of Policy and Procedures Memos were excluded" from the documents disclosed to him because they were determined to be "pre-decision deliberative material." Appeal Letter at page 2. The appellant contends that "'[p]redecision deliberative material' is not one of the categories of information that the Code exempts from disclosure." Appeal Letter at page 3.

Assuming, for the purposes of this appeal, that the

appellant's allegation is true regarding the substance of his telephone conversation with the DMV FOIA Officer, the issue extant on appeal is whether "predecision deliberative material" is within the purview of one of the statutory exemptions from disclosure enumerated in the D.C.-FOIA.

In the *Petition of Vera Waltman Mayer*, MCU No. 340126, dated June 26, 2003, 50 D.C. Reg. 5765 (July 18, 2003), this office considered the construction and scope to be given to an exemption of the D.C.-FOIA which protects from disclosure certain "[i]nter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency[.]" D.C. Official Code § 2-534(a)(4) ("D.C.-FOIA Exemption 4") (emphasis added).

In the final decision issued on the merits of the aforesaid petition, this office concluded, based on pertinent federal court decisions interpreting the counterpart federal FOIA Exemption, that D.C.-FOIA Exemption 4 incorporates the well-recognized civil discovery privileges recognized by the U.S. Supreme Court and D.C. Circuit in pertinent federal FOIA Exemption 5 cases, to wit: the deliberative process privilege, the attorney-client privilege, and the attorney work product privilege.

The pretrial civil discovery privilege encompassed under D.C.-FOIA Exemption 4 most often invoked by public bodies to withhold internal documents in their possession, custody or control from disclosure to persons outside of the government is the deliberative process privilege.

The deliberative process privilege rests "on the policy of protecting the 'decision making process of government agencies' . . . and focus[es] on documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'"

NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975).

"Manifestly, the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions." Id. at 152.

It is axiomatic that an internal letter, memorandum, or other form of written communication is protected from disclosure under the deliberative process privilege if it is both "predecisional" in nature and "deliberative" in character. Mapother v. Department of Justice, 3 F.3d 1533, 1537 (D.C. Cir. 1993); Petroleum Information Corporation v. U.S. Dep't of Interior, 976 F.2d 1429, 1434 (D.C. Cir. 1992); Access Reports v. Department of Justice, 926 F.2d 1192, 1194 (D.C. Cir. 1991); Formaldehyde Institute v.

Department of Health and Human Services, 889 F.2d 1118, 1121 (D.C. Cir. 1989); Wolfe v. Department of Health and Human Services, 839 F.2d 768, 774 (D.C. Cir. 1988); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

A record in the possession, custody, or control of a public body is "predecisional" when it is "prepared in order to assist an agency decision maker in arriving at [a] decision," Renegotiation Board v. Grumman Aircraft Engineering Corp., 421 U.S. 168, 184-85 (1975), such as "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." Coastal States, supra, 617 F.2d at 866. To the extent that a record maintained by a public body contains information that "reflects the give-and-take of the consultative process", it is of a "deliberative" character. Id.

Generally, "[t]he deliberative character of agency documents can often be determined through 'the simple test that factual material must be disclosed but advice and recommendations may be withheld.'" Mapother, supra, 3 F.3d at 1537 (quoting Wolfe, supra, 839 F.2d at 774). Although the fact/opinion distinction "offers a quick, clear, and

predictable rule of decision," Mead Data Central Inc. v. Department of the Air Force, 566 F.2d 242, 256 (D.C. Cir. 1977), it is not by any means a dispositive test. See Mapother, supra, 3 F.3d at 1537 ("fact/ opinion test . . . is not infallible and must not be applied mechanically"); Petroleum Information Corp., supra, 976 F.2d at 1434) ("fact/opinion distinction . . . is not always dispositive"). As the D.C. Circuit has recognized, the "disclosure of even purely factual information may so expose the deliberative process within an agency that it must be deemed exempted" by federal FOIA Exemption 5. Mead Data, supra, 566 F.2d at 256.

The D.C. Circuit's "decisions on the 'deliberative-ness' inquiry have focused on whether the disclosure of the requested material would tend to 'discourage candid discussion within an agency.'" Petroleum Information Corporation, supra, 976 F.2d at 1434 (citing Access Reports, 926 F.2d at 1195 (quoting Dudman Communications v. Department of Air Force, 815 F.2d 1565, 1567-68 (D.C. Cir. 1987))). Thus, the crucial inquiry in D.C.-FOIA Exemption 4 cases is "whether the disclosure of materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." Id. at 1568.

A determination "that the privilege applies 'should therefore rest fundamentally on the conclusion that, unless protected from public disclosure, information of that type would not flow freely within the agency.'" Tax Analysts v. Internal Revenue Service, 117 F.3d 607, 617 (D.C. Cir. 1997) (quoting Mead Data, supra, 566 F.2d at 256).

An internal memorandum or other document drafted by a subordinate employee which is ultimately routed through the chain-of-command to a senior official with decision-making authority is likely to be a part of an agency's deliberative process because it will probably "reflect his or her own subjective opinions and will clearly have no binding effect on the recipient." Access Reports, supra, 926 F.2d at 1195. Conversely, an internal memorandum or other document which is prepared or approved by a senior official which flows down the chain-of-command to subordinate employees "is far more likely to manifest decisionmaking authority and to be the denouement of the decisionmaking rather than part of its give-and-take." Id.

Federal cases construing federal FOIA Exemption 5 are particularly instructive in determining the proper interpretation to be given to the provisions of D.C.-FOIA

Exemption 4.⁷

Based on the record evidence on appeal, this office is unable to determine whether any of the DMV's "Policy and Procedures Memos" -- if they exist and were withheld from disclosure to the appellant -- are protected from disclosure under the deliberative process privilege incorporated under D.C.-FOIA Exemption 4. Therefore, this office is required to remand this appeal to the DMV for additional information which addresses, as a preliminary matter, the question as to whether any responsive documents were withheld from disclosure to the appellant.

If the answer to the question posed is "yes," and it is determined upon further review on remand that any responsive documents (or reasonably segregable portions thereof) are protected from disclosure, DMV shall address the issue

⁷ Due to the dearth of pertinent D.C.-FOIA case law, this office has relied upon federal court decisions discussing an agency's disclosure obligations under the federal FOIA based on binding D.C. Court of Appeals case precedent which instructs that under circumstances where, as here, a "statute is borrowed extensively from a federal statute, as the D.C.-FOIA was from the federal Freedom of Information Act . . . the decisions of the (federal) court of last resort are normally adopted with the statute." Donahue v. Thomas, 618 A.2d 601, 602 n. 3 (D.C. 1992) (quoting Lenaetts v. District of Columbia Dep't of Employment Services, 545 A.2d 1234, 1238 n.9 (D.C. 1988)). Therefore, "except where the two acts differ, . . . case law interpreting the federal FOIA [is] instructive authority with respect to our own Act." Washington Post, supra, 560 A.2d at 521 n.5.

regarding the applicability of D.C.FOIA Exemption 4's deliberative process privilege to any withheld information.⁸

However if, on remand, the DMV determines that all responsive documents that it was able to locate were provided to the appellant, then the relevant issue which is required to be addressed is whether its search for responsive documents was adequate and, therefore, satisfies its information disclosure obligations under the D.C.-FOIA.

The legal standard for evaluating a federal agency's "claim of compliance with [federal] FOIA disclosure obligations" appears to be well established in federal case law. Weisberg v. U.S. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In this regard, the federal courts have consistently held that in order to meet its burden that it has complied with its obligations to disclose under the federal FOIA, "an agency must demonstrate that it has conducted a 'search reasonably

⁸ A determination that D.C.-FOIA Exemption 4 applies does not end the DMV's inquiry on remand because the regulations which implement the D.C.-FOIA also require public bodies to provide "a statement of the public interest considerations which establish the need for withholding the record." 1 DCMR § 407.2(b) (June 2001).

The apparent purpose of this regulatory requirement is to foster discretionary disclosures of otherwise exempt records as a matter of sound administrative discretion in

calculated to uncover all relevant documents.'" Weisberg, supra, at Id. (quoting Weisberg v. Department of Justice, 705 F.2d 1344, 1350-51 (D.C. Cir. 1983)).

In determining whether an agency has satisfied its records disclosure duties and responsibilities under the federal FOIA, "the issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate." Id. "In demonstrating the adequacy of the search, the agency may rely upon reasonably detailed, nonconclusory affidavits submitted in good faith." Id. An affidavit is "reasonably detailed" if it sets "forth the search terms and the type of search performed, and avers that all files likely to contain responsive materials (if such records exist) were searched." Oglesby v. United States Department of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990); see also Perry v. Block, 684 F.2d 121, 127 (D.C. Cir. 1982) ("affidavits that explain in reasonable detail the scope and method of the search conducted by the agency will suffice to demonstrate compliance with the obligations imposed by the FOIA"); Trans Union, LLC v. Federal Trade Commission, 141 F.Supp.2d

the absence of a compelling countervailing public interest militating against the disclosure of such information.

62, 67 (D.D.C. 2001).

Although the standards enunciated in the federal FOIA cases cited above apply to the consideration of motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 56, this office is of the opinion that the aforesaid legal principles are likewise germane to a determination as to whether FOIA appeals should be subject to summary disposition via final decision at the administrative agency level.

Because there is also insufficient evidence in the record for this office to make a reasoned determination on the propriety of the DMV's response to the appellant's D.C.-FOIA request, the Secretary of the District of Columbia concludes that it is necessary for the DMV to provide additional information to supplement the record.

Accordingly, this matter is remanded to DMV for further consideration in accordance with the instructions set forth in this final decision.

IV. CONCLUSION

For all the foregoing reasons, this matter is remanded to DMV with instructions as follows:


DMV shall submit, via reasonably detailed affidavit(s) attested to by cognizant officials and employees, evidence regarding either (1) the applicability of D.C.-FOIA

Exemption 4, if any records were withheld from disclosure to the appellant, along with the public interest considerations which establish the need therefor, or (2) the adequacy of its search for documents within the scope of the appellant's D.C.-FOIA request if it is determined that no additional responsive documents exist.

Such affidavit(s) shall be submitted to the Office of the Secretary, with a courtesy copy to the appellant, within seven (7) working days of the receipt of this decision.

DMV is further directed to provide a written certification to the Mayor (via the General Counsel to the Mayor), with a courtesy copy to the Office of the Secretary, within ten (10) working days indicating its compliance with the instructions in this decision or the reasons for noncompliance with the directives herein.

This constitutes the final decision of the Secretary of the District of Columbia in this matter.


SHERRYL HOBBS NEWMAN
SECRETARY OF THE DISTRICT OF COLUMBIA

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE
OFFICE OF THE SECRETARY
OF THE DISTRICT OF COLUMBIA
WASHINGTON, D.C. 20001

Final Decision

Appeal of: E. Keith Johnson
Matter No: MCU 406151
Date: April 8, 2004

Arnold R. Finlayson, Esq., Director, Office of Documents and Administrative Issuances, participated in the preparation of this decision.

INTRODUCTION

The above-captioned matter is before the Office of the Secretary for a decision on the administrative appeal to the Honorable Anthony A. Williams filed by E. Keith Johnson (hereinafter the "appellant") pursuant to the administrative review provisions¹ of the District of Columbia Freedom of Information Act ("D.C.-FOIA"), D.C.

¹ Pursuant to section 207(a) of the D.C.-FOIA, "[a]ny person denied the right to inspect a public record of a public body *may petition the Mayor* to review the public record to determine whether it may be withheld from public inspection." D.C. Official Code § 2-537(a) (emphasis added).

Official Code § 2-531 et seq. (2001).²

The present appeal arises from the Department of Consumer Affairs' ("DCRA") determination that, at the time of the submission of the appellant's D.C.-FOIA request, an investigative report responsive thereto was not available for release, and its concomitant denial of the appellant's request for a waiver of fees in connection with the administrative processing of the subject D.C.-FOIA request.

BACKGROUND

According to its website, "[t]he National Association of Veteran Program Administrators (NAVPA) is an organization of institutions and individuals who are involved or interested in the operation of veterans affairs programs and/or the delivery of services to veterans as school certifying officials across the country." <http://www.navpa.org/>

The appellant is a former member of the board of directors of NAVPA. The appellant states in his appeal letter that "[w]ithout due process, [he] was removed from the organization's board of directors when, as Chairman of the Internal Audit Committee, [he] requested pertinent financial records to conduct a review of and report on the

² Pursuant to Mayor's Order 97-177, dated October 9, 1997, the Secretary of the District of Columbia was delegated the authority vested in the Mayor to render final decisions on, inter alia, appeals and petitions for review under the D.C.-FOIA.

organization's financial status." Johnson Appeal Letter at page 1.

The appellant wrote a letter to DCRA's FOIA Officer, dated November 12, 2003 which made a reference to "CASE: Citation Number 050038 - National Association of Veterans Program Administrators" and stated, in the first paragraph, as follows:

I am the complainant in the above-referenced matter and I have been following the case's progress. It is my understanding that a citation has been issued and an administrative hearing is being scheduled. I have spoken with the investigator assigned to the case several times and I have learned he has prepared a written report of his investigation findings. I am requesting a copy of the investigation's written report in its entirety pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552.³

Letter dated November 12, 2003 from E. Keith Johnson to D. Britt, FOIA Officer, DCRA.

The appellant further stated, in part, in the second paragraph of his November 12, 2003 letter that "I am requesting a waiver of all fees." Id.

The DCRA's response to the appellant's November 12, 2003 FOIA request came in a letter to him dated December 1, 2003 which, inter alia, advised the appellant that "the investigative report you are seeking is currently under review and will not be available for release until after an

³ The appellant cites the federal FOIA as the authority for his request for information.

administrative hearing before the Office of Adjudication."
Letter dated December 1, 2003 from D. Britt to E. K.
Johnson.

The letter from DCRA's FOIA Officer to the appellant informed him that "[p]ursuant to D.C. Official Code § 2-532(b), there is a \$10.00 fee for searching agency records and additional costs for duplicating records at the established rate." Id. The letter went on to state that "[r]equestors are liable for payment of the search fee whether the Department locates any records or not." Id.

Finally, with respect to the appellant's request for a fee waiver for processing his request for information, DCRA's FOIA Officer advised him as follows:

Please note that I reviewed your request for a waiver of fees and find that your justification based on your seeking "the requested information for professional and official use and not for commercial gain ... [d]isclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of a public organization that is soliciting money but is in violation of law ... [and] is not primarily in any commercial interest or business trying to get information on industrial competitors" does not warrant a fee waiver.

Id.

Dissatisfied with the DCRA's response, the appellant commenced the instant appeal in which he conspicuously identified that matters presented for review in his letter

to the Mayor as follows:

My most recent request for a copy of the investigation report to submit along with the IRS complaint was effectively denied. A request for waiver of fees was also denied. Therefore, I am respectfully appealing both issues.

Appeal Letter at page 2.

Following a general overview of the legal principles underlying the D.C.-FOIA, this decision considers the propriety of the DCRA's response to the appellant's D.C.-FOIA request.

GENERAL OVERVIEW OF THE D.C.-FOIA

The D.C.-FOIA, like the federal FOIA upon which it was modeled, was enacted in 1976 to divest government officials of broad discretion in determining what, if any, government records should be made available to the public upon the receipt of a request for information. See Subcommittee on Administrative Practice & Procedure of the Senate Committee on Judiciary, 95th Cong., 2d. Sess., Freedom of Information: A Compilation of State Laws (Comm.Print 1978); see also Washington Post v. Minority Business Opportunity Commission, 560 A.2d 517, 521 (D.C. 1989). In this regard, the D.C.-FOIA was "designed to promote the disclosure of information, not inhibit it." Id.

The D.C.-FOIA embodies "[t]he public policy of the District of Columbia . . . that all persons are entitled to

full and complete disclosure of information regarding the affairs of government and the official acts of those who represent them as public officials and employees." D.C. Official Code § 2-531; see Donahue v. Thomas, 618 A.2d 601, 602 n.2 (D.C. 1992); Newspapers, Inc. v. Metropolitan Police Department, 546 A.2d 990, 993 (D.C. 1988); Barry v. Washington Post Company, 529 A.2d 319, 321 (D.C. 1987).

In order to accord full force and effect to the spirit and intent of the D.C.-FOIA, officials of District of Columbia public bodies are required to construe its provisions "with the view toward expansion of public access and the minimization of costs and time delays to persons requesting information." D.C. Official Code § 2-531; see Washington Post, 560 A.2d at 521; Newspapers, Inc., 546 A.2d at 993. Thus, the policy underlying the D.C.-FOIA favors the broad disclosure of official records in the possession, custody or control of public bodies of the government of the District of Columbia, unless such records (or portions thereof) fall squarely within the purview of one or more of the nine categories of information which are expressly exempted from the disclosure mandate. See Washington Post, supra; Newspapers, Inc., supra. The nine statutory exemptions enumerated in the D.C.-FOIA, which protect certain types of confidential and/or privileged

information from disclosure, "are to be construed narrowly, with ambiguities resolved in favor of disclosure."

Washington Post, supra.

DISCUSSION

Section 202(a) of the D.C.-FOIA provides that "[a]ny person has [the] right to inspect, and at his or her discretion, to copy any public record of a public body, except as otherwise expressly provided by § 2-534." D.C. Official Code § 2-532(a) (emphasis added).

Section 2-534 of the D.C. Official Code, entitled "**Exemptions from disclosure**," in turn, enumerates nine categories of information which "may be exempt from disclosure under the provisions of [the D.C.-FOIA]." D.C. Official Code § 2-534(a) (1)-(9) (emphasis added).⁴

Taken together, sections 2-532(a) and 2-534 of the D.C. Official Code clearly and explicitly require the mandatory disclosure of all public records in the possession, custody or control of District public bodies,

⁴ In the legal sense, the "use of the word 'may' in a statute ordinarily denotes discretion." In re Langon, 663 A.2d 1248 (D.C. 1995). Indeed, the federal FOIA has been interpreted by federal courts to permit agencies to make discretionary disclosures of records otherwise exempt under at least four of the exemptions to the federal FOIA. See Bartholdi Cable Co. v. FCC, 114 F.3d 274, 282 (D.C. Cir. 1997) ("FOIA's exemptions simply permit, but do not require, an agency to withhold exempted information").

to the extent that such records (or any reasonably segregable portions thereof),⁵ do not fall within the ambit of any of the nine statutory exemptions which protect certain categories of public records from disclosure. See Barry v. Washington Post Co., 529 A.2d 319, 321 (D.C. 1987) ("The [D.C.-FOIA] provides for full disclosure unless the information requested is exempted under a specific statutory provision").

Propriety of Nondisclosure Determination

The appellant posits that "[i]n correspondence dated December 1, 2003, the FOIA Officer has essentially denied [his] request for a copy of the report of investigation but she has not cited a basis for the denial. . . . The DC Code requires denial exemptions to be explicitly provided to the requestor and it has not." Appeal Letter at page 3.

In support of his position, the appellant relies on D.C. Official Code § 2-533(a) which provides, in pertinent part, as follows:

§ 2-533. Letters of denial.

(a) Denial by a public body of a request for any public record shall contain at least the following:

⁵ D.C. Official Code § 2-534(b) provides, in pertinent part, that "[a]ny reasonably segregable portion of a public record shall be provided to any person requesting such record after deletion of those portions which may be withheld from disclosure under subsection (a) of this section."

(1) The specific reasons for the denial including citations to the particular exemption(s) under § 2-534 relied on as authority for the denial[.]

The regulations which implement the D.C.-FOIA also make specific provisions for the contents of responses which deny, in whole or in part, a request for information as follows:

407 RESPONSES TO REQUESTS

407.2 A response denying a written request for a record shall be in writing and *shall* include the following information:

- (a) The identity of each person responsible for the denial;
- (b) *A reference to the specific exemption or exemptions authorizing the withholding of the record with a brief explanation of how each exemption applies to the record withheld and a statement of the public interest considerations which establish the need for withholding record. Where more than one record has been requested and is being withheld, the foregoing information shall be provided for each record withheld; and*
- (c) A statement of the appeal rights provided by the Act.****

1 DCMR § 407 (June 2001) (emphasis added).

In the present matter, the DCRA advised the appellant that, during the pendency of the hearing before the Office of Adjudication, the investigative report was not available for release.

On appeal, the appellant correctly points out that the DCRA's December 1, 2003 written response to his FOIA request did not cite any of the applicable exemptions under the D.C.-FOIA to justify the withholding of the investigative report, as specifically required by D.C. Official Code § 2-533(a). In the absence thereof, the present appeal of the DCRA's denial of the investigative report is required to be sustained based on the improper grounds stated in the denial letter, and this matter shall be remanded to the DCRA for a proper response that complies with the requirements of D.C. Official Code § 2-533(a)(1) and 1 DCMR § 407(b).

Waiver of Fees

The D.C.-FOIA provides, in pertinent part, that "a public body may establish and collect fees . . . for . . . making copies of records," and that "documents may be furnished without charge . . . where a public body determines that waiver . . . of the fee is in the public interest. . . ." D.C. Official Code § 2-532(b) (emphasis added).

The D.C.-FOIA further provides that "any person denied the right to inspect a public record of a public body may petition the Mayor to review the public record to determine whether it may be withheld from public inspection." D.C. Official Code § 2-537(a) (emphasis added).

Construed literally, the administrative review provisions of the D.C.-FOIA and its implementing regulations provide requesters of public records the right to challenge a public body's denial of access to public records, as distinguished from the right to obtain copies of non-exempt records (if located) without payment of a reasonable search and copying fee.

The D.C.-FOIA and its implementing regulations do not confer jurisdiction upon the Mayor to review a public body's discretionary determination on whether to grant or deny a request for a waiver of its fees for services rendered in searching for, and copying, records in response to requests for information under the D.C.-FOIA. Such determination is committed to the sound administrative discretion of the public body processing the D.C.-FOIA request(s).

In this matter, the appellant has not asserted that DCRA's assessment of a search and copying fee is unreasonable or excessive based on the number of documents which are required to be located, reviewed and copied per its D.C.-FOIA request.

Accordingly, it is the decision of the Secretary of the District of Columbia that the appellant's appeal of the DCRA's denial of his request for a waiver of fees is

required to be, and hereby is, dismissed for lack of jurisdiction.

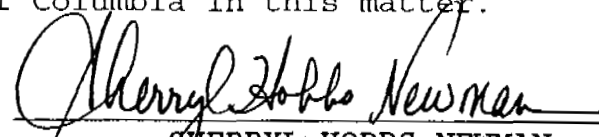
CONCLUSION

For all the foregoing reasons, the instant appeal is sustained, in part, and remanded, in part, on that portion of the appeal related to the nondisclosure of the investigative report, and dismissed for lack of jurisdiction in connection with the appeal of the denial of the request for waiver of fees.

On remand, the DCRA is required to provide a written response to the Office of the Secretary, with a courtesy copy to the appellant, within seven (7) working days, that meets the requirements of 1 DCMR § 407, entitled "RESONSES TO REQUESTS."

DCRA is also directed to provide a written certification to the Mayor (via the General Counsel to the Mayor), with a courtesy copy to the Office of the Secretary, within ten (10) working days of the receipt of this decision which indicates its compliance, or the reasons for noncompliance, with the instructions herein.

This constitutes the final decision of the Secretary of the District of Columbia in this matter.


SHERRYL HOBBS NEWMAN
SECRETARY OF THE DISTRICT OF COLUMBIA

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

Appeal No. 16950 of the West End Citizens Association, pursuant to 11 DCMR §§ 3100 and 3101, of the administrative decisions of David Clark, Director, and Robert Kelly, Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue Certificate of Occupancy No. 39477 on August 16, 2002 to The George Washington University, permitting the occupancy of the subject property for residential (apartment) and parking use, pursuant to a Planned Unit Development in a C-3-C zone district at premise 1957 E Street, N.W. (Square 122, Lot 835).

HEARING DATES: December 17, 2002 and January 14, 2003
DECISION DATE: March 4, 2003

DECISION AND ORDER

PRELIMINARY AND PROCEDURAL MATTERS:

This appeal was brought by the West End Citizens Association (WECA), a nonprofit association involved with civic matters within the "Foggy Bottom/West End" community. On September 23, 2002, WECA filed an appeal with the Office of Zoning (OZ) of the decision of then-Zoning Administrator (ZA), Robert Kelly, to approve the issuance of Certificate of Occupancy (C of O) No. 39477 to The George Washington University (University). The C of O enabled the University to occupy part of a multi-story building for apartment and parking uses pursuant to an approved Planned Unit Development (PUD) at premise 1957 E Street, N.W. (subject property). In its appeal document, WECA contended that the C of O should not have been issued because the University was not in compliance with Zoning Commission Order No. 746-C, the order that granted the University authority to build the PUD. WECA also contended that the ZA tried to improperly add conditions to a Zoning Commission Order, failed to timely respond to a Freedom of Information Act (FOIA) request and erred in not issuing daily fines for alleged non-compliance.

WECA alleged that the University had failed to comply with two conditions and one provision of Zoning Order No. 746-C. Specifically, WECA alleged that the University had not complied with Condition No. 9(a), which states that, on the day the C of O for the subject property is issued, the University shall make the first of five \$100,000 contributions to the Foggy Bottom Feeding Program. WECA also alleged non-compliance with Condition No. 12, which states that the University shall comply with the D.C. Environmental Policy Act (D.C. Official Code § 6-981 *et seq.* (2001)) on all future campus construction projects. Lastly, WECA contended that the University had failed to comply with finding of fact No. 32, which notes an agreement between WECA and the

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University to manage student parking in the Foggy Bottom/West End area and reiterates certain intentions of the parties concerning the implementation of this agreement.

By letter dated September 25, 2002, OZ notified the University, the Director of the Department of Consumer and Regulatory Affairs (DCRA), under whom the ZA operates, Advisory Neighborhood Commission (ANC) 2A, the ANC member for Single Member District 2A05, the Councilmember for Ward 2 and the District of Columbia Office of Planning (OP), of the filing of the appeal. Pursuant to § 3112.14 of Title 11 of the District of Columbia Municipal Regulations (DCMR), OZ, by letter dated October 25, 2002, notified the ZA, WECA, ANC 2A and the University of the hearing date of December 17, 2002. The University was notified of the filing of the appeal and the hearing date because, as owner of the subject property, it is a party to the appeal pursuant to 11 DCMR § 3199.

The Board held a public hearing on the appeal on December 17, 2002, which was continued to January 14, 2003. During the December 17th hearing, Ms. Barbara Kahlow and Ms. Sara Maddux argued the appeal for WECA. Ms. Kahlow presented WECA's arguments on the University's alleged non-compliance in three areas: the Condition 9(a) feeding program contribution, the D.C. Environmental Protection Act (DCEPA) and the parking agreement with WECA. Ms. Maddux testified further concerning parking in the Foggy Bottom/West End area. She also testified as to two new alleged grounds for appeal which did not appear on the appellant's September 23, 2002 appeal document. Ms. Maddux brought up the University's alleged failure to provide required retail at the subject property (Condition No. 9(b) of Order 746-C) and its alleged failure to implement an approved landscape plan (Condition No. 7 of Order 746-C).

At the December 17, 2002 hearing, the ZA testified, explaining and defending his actions. WECA questioned him regarding, among other things, his alleged improper addition of conditions to a Zoning Commission Order, his alleged failure to respond timely to a FOIA request, and his alleged failure to impose fines. He denied any irregular or improper acts or wrongdoing.

The University, through its counsel, and the testimony of the University's Senior Counsel, Mr. Charles Barber, asserted that the University was in compliance with Condition 9(a), that Condition 12 (DCEPA) applied prospectively only, and therefore did not apply here, that the parking issue arose out of a private agreement between the University and WECA, and that it was therefore not properly before the Board, and that the other two issues, concerning the required retail and the landscape plan, were not yet ripe for review.

By virtue of 11 DCMR § 3199.1, ANC 2A is a party to this appeal. The ANC did not present any testimony on December 17th, but on December 29, 2002, the ANC held a special meeting and designated Ms. Dorothy Miller and Ms. Elizabeth Elliott to represent it at the continued hearing scheduled for January 14, 2003. At this continued hearing,

Ms. Kahlow and Ms. Maddux again appeared on behalf of the appellant. The two ANC representatives, Ms. Miller and Ms. Elliott, testified that the ANC was not taking a position with regard to this appeal, but was remaining neutral.

After the January 14th hearing, the Board requested the submission of additional information, after the receipt of which the Board held a public decision meeting on March 4, 2003. At the decision meeting, the Board decided, by a vote of 5-0-0, to deny the appeal on all grounds.

FINDINGS OF FACT

1. The subject property, acquired by the University in 1999, is located at 1957 E. Street, N.W. On the property, the University is building a multi-story building for residential (apartment) and parking use.
2. The subject property is zoned C-3-C and is located in the Foggy Bottom/West End Neighborhood of the District of Columbia.
3. Pursuant to Zoning Commission Order No. 746, dated December 10, 1993, a Planned Unit Development requested by the Associated General Contractors of America was approved for the subject property and the property was rezoned from an SP-2 zone district to the current C-3-C zone district. The 1993 Order approved the site for the construction of a mixed-use building, with both residential and commercial uses. The PUD approved a floor area ratio (FAR) of 5.79 for commercial space and a FAR of at least 2.17 for residential space.
4. Zoning Commission Order No. 746 was extended for two years, until December 10, 1997, by Order No. 746-A, with construction to begin not later than December 10, 1998. Order No. 746-B extended Order No. 746 for another two years, requiring the acquisition of a building permit by December 10, 1999, and the commencement of construction not later than December 10, 2000.
5. After purchasing the subject property in 1999, the University obtained approval from the ZA for several non-major changes to the approved PUD plans, as well as a building permit approving construction of the project, under the original PUD order, *i.e.*, Order No. 746. WECA and Advisory Neighborhood Commission 2A appealed the ZA's actions. On appeal, the Board of Zoning Adjustment overturned the issuance of the building permit and held that the ZA had exceeded his discretion in that the proposed changes should have been presented to the Zoning Commission as a PUD modification.
6. The University, therefore, applied to the Zoning Commission for modifications to the approved PUD plans. After appropriate application and public hearing on the matter, the Zoning Commission approved modifications to the PUD in Order No. 746-C, which granted the University permission to proceed with the construction of the building on the subject property, but modified the PUD with additional

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terms and conditions which the University is obligated to perform. (Exhibit A to Exhibit No. 29).

7. The Department of Consumer and Regulatory Affairs, through the Zoning Administrator, issued Certificate of Occupancy No. CO39477 for the building on August 16, 2002. WECA now alleges that the University failed to abide by certain conditions of Order No. 746-C and that therefore issuance of the C of O was error on the part of the ZA.

Condition No. 9(a) of Zoning Commission Order No. 746-C

8. Condition No. 9(a) of Order 746-C states, in relevant part, as follows:

The University shall contribute \$500,000 over five (5) years for the purpose of operating a program of providing meals at reduced rates for the needy, elderly, and other low-income residents of Foggy Bottom (the "Feeding Program") at one or more food service venues in Foggy Bottom, such as venues in University-owned or leased facilities. The \$500,000 contribution will be \$100,000 a year for five (5) years to the Foggy Bottom Feeding Program Foundation, Inc. (the "Foundation"), an established District of Columbia nonprofit corporation organized by the representatives of the University and WECA. ... **The first \$100,000 contribution shall be made on the date of the Certificate of Occupancy for the Subject Property.** ... The contribution shall be conditioned so that no portion of the \$500,000 contribution ... may be used for salaries, expenses and other costs relating to the administering the Feeding Program. The entirety of the \$500,000 contribution paid by the University shall be conditioned upon its exclusive use to provide food and meals to needy, elderly, and other low-income residents. **If, for any reason, the Feeding Program cannot operate as described above or the Feeding Program fails to comply with the above-stated funding condition, then the University shall pay \$100,000 a year to an existing, nonprofit food service Program selected by the Foundation until (a) the Feeding Program begins or resumes operation; (b) the Feeding Program achieves compliance with the funding condition; or (c) the \$500,000 is fully expended, whichever comes first.** (Emphasis added.)

9. Zoning Commission Order No. 746-C (Order 746-C) became effective on August 16, 2002.

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10. On August 12, 2002, the University wrote to Mr. Batham, a representative of the Foggy Bottom Feeding Program Foundation (Foundation) and informed him that the University was about to apply for a C of O for the residential wing of the building on the subject property. (Exhibit No. 30). The letter pointed out that the Foundation did not yet have a feeding program in operation and therefore requested that, pursuant to Condition 9(a), the Foundation designate an alternative, existing feeding program to receive the University's first \$100,000 contribution.
11. DCRA issued the first Certificate of Occupancy for the building on the subject property on August 16, 2002. (Exhibit No. 23).
12. By August 16, 2002, the Foundation had not designated an alternative feeding program, but instead, members of WECA requested more time to establish the Foundation's own feeding program.
13. On August 16, 2002, the University sent Mr. Batham and the ZA a letter explaining that, because the Foundation's feeding program was not yet operating and an alternative had not been designated, the University had, on August 16th, deposited the first \$100,000 contribution in an interest-bearing escrow account at Riggs Bank under the name of "George Washington University Elliott School Escrow Account." (Exhibit D to Exhibit No. 29).
14. The term of the escrow account was three months, with its expiration on November 16, 2002, although the money could be removed from the account earlier. (See, Exhibit No. 28, fn. #1). The University designated the ZA as escrow agent for the account.
15. In the August 16th letter referenced in Finding of Fact No. 12, the University proposed the following solutions to the situation: If the Foundation's feeding program were operating prior to November 16, 2002, the money from the escrow would be paid to it at that time. If the Foundation's program were still not operating at that time, the money would be paid to an alternative feeding program selected by the Foundation. If, however, the Foundation's program did not yet exist and the Foundation had not yet selected an alternative program by November 16th, the University would request the Zoning Commission to determine how the money should be applied.
16. The Foundation, to which Condition 9(a) directs the first \$100,000 contribution, was operating as a nonprofit organization on August 16, 2002. However, Condition 9(a) also places two conditions on the contribution: (1) "no portion of the \$500,000 contribution ... may be used for salaries, expenses and other costs relating to administering the program," and (2) "its exclusive use to provide food and meals to needy, elderly, or other low-income residents." On August 16, 2002, the Foundation's feeding program was not operating.
17. It appears, from a series of e-mails between the ZA and the DCRA staff, sent between August 19, 2002 and August 29, 2002, that the ZA did not desire to be escrow agent for the University and that DCRA was concerned about the University's unilateral decision to set up the escrow account without WECA's prior agreement. (See, Attachments B & C to Exhibit No. 27).

18. On August 28, 2002, the ZA sent an e-mail to the University stating "it would appear that GWU (the University) is now in violation of Condition 9(a) of Order 746-C." (See, Attachment B to Exhibit No. 27).
19. On September 6, 2002, however, the ZA sent a letter to the Foundation, Mr. Batham, in his capacity as president of WECA, and the University. (Exhibit No. 28). The letter finally concludes that the University did not violate Condition 9(a) and requests that the Foundation either certify that its own feeding program has been established or that it designate an alternative feeding program. The letter goes on to state that, as soon as the Foundation takes one of these actions, the ZA will direct the proper disposition of the escrow funds.
20. In his September 6, 2002, letter, the ZA specifically requested one of two things from the Foundation:
 - 1) A resolution by the Board of Directors, duly adopted in accordance with D.C. law and the bylaws of the Foundation, certifying that a feeding program has been established and that the Foundation is prepared to operate the feeding program in conformance with the requirements of the Zoning Commission Order; or
 - 2) A resolution by the Board of Directors, duly adopted in accordance with D.C. law and the bylaws of the Foundation, designating an existing non profit food service program to receive the first \$100,000, in lieu of the Foundation.
21. In Zoning Commission Order 746-D, effective February 7, 2003, of which the Board took judicial notice at the March 4, 2003 decision meeting, the Zoning Commission added the following language to Condition 9(a), clarifying its meaning:

If the Foundation neither establishes the Feeding Program in compliance with this condition, nor identifies an alternative existing food service program within 30 days after receipt of a written request from the University to the Foundation, the University shall select a non-profit food service and/or homeless program operating within the Foggy Bottom area and not affiliated with the University to be the donee of the contribution, and said contribution shall be delivered within 10 business days after the expiration of the above-referenced 30-day period.
22. At a Board of Directors' meeting on February 27, 2003, the Foundation approved the existing food service program of St. Mary's Court Housing Development Corporation to be the recipient of the first \$100,000 contribution. The money was to be placed in the Foundation's account and then transferred to the use of St. Mary's Court.

Condition No. 12 -- District of Columbia Environmental Policy Act

23. Condition No. 12 of Order No. 746-C states: "[t]he University shall comply with the D.C. Environmental Policy Act (D.C. Code § 6-981 *et seq.*), subject to any applicable amendments, regulations or judicial interpretation, **on all future campus projects.**" (Emphasis added.)
24. The Board finds that the Condition applies only prospectively and therefore does not apply to the building on the subject property.

Parking Restrictions

25. Findings of Fact No's. 6(h) and 32 of Order 746-C note that the University had a private agreement with WECA to restrict freshmen and sophomores living in the Foggy Bottom/West End area from bringing cars to the University (with certain exceptions) and that the University would publish this restriction in its printed materials. These two findings of fact merely re-state the facts as they existed at the time. They do not require the University to do anything, nor do they amount to a condition of Zoning Commission Order No. 746-C.
26. This agreement between the University and WECA amounts to a private contract, which was not incorporated into Zoning Commission Order No. 746-C.

Condition No. 9(b) -- Provision of Required Retail

27. Condition 9(b) of Order 746-C states:
- The University shall use its best efforts to fill the retail space called for in this Order ... with appropriate retail tenants. In the event that the University, despite its best efforts, is unable to rent the space within one (1) year of the issuance of the certificate of occupancy for the subject property, the University shall commence operation of the retail operation in the space under its own authority within that time frame. ... The University shall provide status reports on such retail operations on an annual basis to the Zoning Administrator, WECA and ANC 2A.
28. Condition No. 9(b) does not create a duty on the part of the ZA to contact the University to determine what the University is doing in order to implement and/or comply with this condition.
29. Condition 9(b) clearly allows the University one year from August 16, 2002 within which to provide the retail tenants required by Order 746-C. This appeal was brought on September 23, 2002, and therefore this issue was not ripe for the Board's consideration.

Condition No. 7 -- Implementation of Landscape Plan

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31. Condition No. 7 in Order 746-C states that the University shall implement the same landscaping plan for this project as that approved in the original PUD. This landscaping plan, however, is not in the record.
32. At the time this appeal was brought, only a portion of the building on the subject property was completed. The Board finds that there was not yet any way to determine whether the University would properly implement the landscape plan and that, therefore, this issue was not ripe for the Board's review.

Alleged Failure to Issue Daily Fines for Non-Compliance

33. DCRA did not issue any fines to the University for non-compliance with any aspect of Zoning Commission Order No. 746-C.

CONCLUSIONS OF LAW AND OPINION

An appeal to the Board may be taken by any person aggrieved by any decision of any District official in the administration and/or enforcement of the zoning regulations, including the issuance of a certificate of occupancy. 11 DCMR §§ 3100.2 and 3200.2. The Board's regulations arise out of the authority and jurisdiction conferred upon it by D.C. Official Code § 6-641.07(f) (2001), in accordance with §8 of the Zoning Act of 1938 (52 Stat. 797, 799, as amended). D.C. Official Code § 6-641.07(g) limits the Board's jurisdiction to the decisions/actions "in the carrying out or enforcement of any regulation adopted pursuant to this subchapter and subchapter V of this chapter," *i.e.*, Subchapter IV. Zoning Regulations and Subchapter V. Chanceries. The Board therefore has no subject matter jurisdiction over WECA's claims as to non-compliance with the DCEPA or with FOIA. Nor does the Board have jurisdiction to rule upon alleged non-compliance with any aspect of any private agreement between WECA and the University, whether relating to parking or another subject.

The Board, however, does have jurisdiction over WECA's remaining claims, *to wit*: whether the University complied with Conditions 9(a), 9(b) and/or 7 of Order 746-C, whether the ZA improperly added conditions to Order 746-C, and whether the ZA erred in not issuing daily fines for alleged non-compliance. The Board will discuss each claim briefly, in turn.

Condition 9(a)

After a careful analysis of the whole of Condition 9(a), the Board concludes that the clear intent of the Zoning Commission was to provide money only for the Foundation's feeding program and not merely to provide money to the Foundation, to be used as it saw fit. The money is to be used by the Foundation only to feed the "needy, elderly, and other low-income" residents, and not for "salaries, expenses and other costs relating to administering the Feeding Program." Condition 9(a) seems to pre-suppose the operation

of the Foundation's feeding program prior to the first contribution and does not say that the University will provide the money to enable the Foundation to start a feeding program.

Although the Board finds that the Commission's intent was clear in Order No. 746-C, it was further clarified in Order No. 746-D, wherein the Commission specifies that, if neither the Foundation's feeding program is established nor an alternative program been selected by the Foundation within a prescribed period of time, the University shall choose a food service or homeless program to receive the contribution. Order No. 746-D does not say that if the Foundation's feeding program is not yet established, the contribution should go directly to the Foundation to be used to establish such a program. The Commission was concerned that the money go to feed the poor and homeless, not that the money go to the Foundation.

Acting on the Zoning Commission's intent, in its August 12th letter, the University asked the Foundation to designate an alternative feeding program, as its feeding program was not yet operational. As of the date of the issuance of the C of O, August 16, 2002, the Foundation's program was still not established and the Foundation had not yet designated an alternative program. The University decided to open the escrow account to hold the first \$100,000 contribution until one of these things occurred, otherwise it would have to return to the Commission for guidance. The ZA determined that the University's actions did not violate Condition 9(a).

The Board finds that the creation of the escrow account was a reasonable attempt by the University to comply with Condition 9(a). The University reasonably read Condition 9(a) to require the money to be paid to the Foundation's feeding program or a designated alternate, and not to the Foundation itself. With the Foundation's feeding program not established and no alternate designated on August 16th, when the C of O was issued, the University was in danger of not complying with Condition 9(a) if it did not do something. The escrow account set aside the \$100,000 until such time as all the requirements of Condition 9(a) were met, or the Zoning Commission gave further guidance. No only was this not a violation of Condition 9(a), but it was actually the University's to attempt to comply with the Condition. Therefore, the Board concludes that the ZA did not err in finding that the University was not violating Condition 9(a).

Condition 9(a) could be interpreted to condition the issuance of the first C of O for the subject property on the payment of the first \$100,000 contribution. The Board, however, does not find this interpretation persuasive because the language of Condition 9(a) does not support it. The language shows no clear intent on the part of the Zoning Commission to make the payment a prerequisite to the issuance of the C of O. Instead, the language merely says that the first \$100,000 contribution shall be made "on the date of the Certificate of Occupancy." This language could as easily be read to require the issuance of the C of O first, before the contribution was made. The Board therefore finds that

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Condition 9(a) did not make payment of the first \$100,000 contribution a condition precedent to the issuance of the C of O. It merely mandated that the contribution had to be made on the same day that the C of O was issued. Therefore, the Board concludes that the ZA did not err in issuing the C of O on August 16, 2002.

Addition of Conditions to Order

Finding of Fact No. 19 sets forth the two requests by the ZA which the appellants call improper conditions added to Order No. 746-C. These requests were made in order to obtain proof that the Foundation's feeding program was operational or to obtain a designation of an alternative feeding program, to which to direct the first \$100,000 contribution. This appears to the Board to be a reasonable way for the ZA to attempt to acquire the information necessary to avoid any non-compliance with Condition 9(a). The Board concludes that these requests by the ZA were made in an attempt to implement Condition 9(a) and were not improper additions of new conditions to Order 746-C.

Condition 9(b)

Finding of Fact No. 28 sets forth Condition 9(b)'s requirement that the University provide retail operations in the building on the subject property. Condition 9(b) states that this retail must be provided within one year of the issuance of the C of O. Because the first C of O was issued on August 16, 2002, the University has/had until August 16, 2003, to provide the required retail operations. Therefore, when this appeal was filed on September 23, 2002, this issue was not yet ripe for the Board's review.

Condition No. 7

Condition No. 7 of Order 746-C states that the University must implement the same landscape plan for the subject property as that approved in the original PUD. At the time this appeal was brought, however, only one section of the building was complete. In fact, the C of O issued on August 16, 2002 applied only to the residential part of the building. The rest of the building was still under construction. Under these circumstances, the Board finds that it was too early to know whether or not the University would comply with Condition 7 and therefore concludes that this issue was not ripe for the Board's review.

Non-Issuance of Daily Fines

DCRA did not issue any daily fines to the University for non-compliance with Order 746-C. Because the Board finds that the University did not violate any of the complained-of provisions or conditions of Order 746-C, the Board concludes that the ZA did not err in not issuing such daily fines. Moreover, the Board doubts whether such a refusal could serve as grounds for an appeal in view of the absolute discretion normally afforded enforcement decisions. *Heckler v. Chaney*, 470 U.S. 821 (1985).

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For the reasons stated above, the Board concludes that the appellant, WECA, has not met its burden of demonstrating that the ZA erred in any of the ways alleged by appellant herein, over which the Board has jurisdiction. It is hereby **ORDERED** that this appeal is **DENIED**.

VOTE: **5-0-0** (Geoffrey H. Griffis, Anne G. Renshaw, Curtis L. Etherly, Jr.,
David A. Zaidain and Peter G. May, to deny).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring member has approved the issuance of this Decision and Order and Authorized the undersigned to execute the Decision and Order on his or her behalf.

FINAL DATE OF ORDER: APR 01 2004

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL. LM/rsn

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

Application No. 17103 of Stanton Glenn Ltd. Partnership, pursuant to 11 DCMR § 3104.1, for a special exception to allow Child Development Center (60 children, ages infant to 14, and 20 staff) under section 205, (last approved by BZA Order No. 16568, dated May 1, 2000), in the R-5-A District at premises 3040 Stanton Road, S.E. (Square 5879, Lot 11).

HEARING DATE: March 30, 2004
DECISION DATE: March 30, 2004 (Bench Decision)

SUMMARY ORDER

SELF-CERTIFIED

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR § 3113.2.

The Board provided proper and timely notice of the public hearing on this application by publication in the D.C. Register, and by mail to Advisory Neighborhood Commission (ANC) 8B and to owners of property within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 8B, which is automatically a party to this application. ANC 8B did not participate in this application. The Office of Planning (OP) submitted a report in support of the application.

As directed by 11 DCMR § 3119.2, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case pursuant to § 3104.1, for special exception under § 205. No parties appeared at the public hearing in opposition to this application or otherwise requested to participate as a party in this proceeding. Accordingly, as set forth in the provisions and conditions below, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board and having given great weight to the OP report the Board concludes that the Applicant has met the burden of proof, pursuant to 11 DCMR §§ 3104.1 and 205, that the requested relief can be granted, subject to the conditions set forth below, as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

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Pursuant to 11 DCMR § 3101.6, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. It is therefore **ORDERED** that this application be **GRANTED** with the following **CONDITIONS**:

1. Approval shall be for **FIVE (5) YEARS**. At the three-year anniversary, the Applicant shall hold a meeting with Advisory Neighborhood Commission (ANC) 8A. The ANC is to provide a report to the Board.
2. The number of children shall not exceed 60.
3. The ages of the children shall range from infant to 14 years old.
4. The number of teachers and staff shall not exceed 20 at any one time.
5. The days and hours of operation shall be Monday through Friday, 7:00 AM to 6:00 PM.
6. Five (5) on-site parking spaces shall be provided.

VOTE: **3-0-2** (Geoffrey H. Griffis, John A. Mann III and Ruthanne G. Miller to approve, Curtis L. Etherly, Jr. and the Zoning Commission member not present, not voting).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring member approved the issuance of this order.

FINAL DATE OF ORDER: APR 01 2004

UNDER 11 DCMR 3125.9, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT."

PURSUANT TO 11 DCMR 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN SIX MONTHS AFTER IT BECOMES EFFECTIVE UNLESS THE USE APPROVED IN THIS ORDER IS ESTABLISHED WITHIN SUCH SIX-MONTH PERIOD.

PURSUANT TO 11 DCMR § 3205, FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART, SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

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THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF THE HUMAN RIGHTS ACT OF 1977, D.C. LAW 2-38, AS AMENDED, AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ., (ACT) THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER. RSN

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

Application No. 17131 of Mary Johnson, pursuant to 11 DCMR § 3104.1, for a special exception to allow a two-story rear addition to a single family row dwelling under section 223, not meeting the lot occupancy requirements (section 403) and rear yard requirements (section 404) in the R-4 District at premises 347 Tennessee Avenue, N.E. (Square 1032, Lot 14).

HEARING DATE: March 23, 2004

DECISION DATE: March 23, 2004 (Bench Decision)

SUMMARY ORDER

SELF-CERTIFIED

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR § 3113.2.

The Board provided proper and timely notice of the public hearing on this application by publication in the D.C. Register, and by mail to Advisory Neighborhood Commission (ANC) 6A and to owners of property within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 6A, which is automatically a party to this application. ANC 6A submitted a report in support of the application. The Office of Planning (OP) submitted a report in support of the application.

As directed by 11 DCMR § 3119.2, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case pursuant to § 3104.1, for special exception under § 223. No parties appeared at the public hearing in opposition to this application or otherwise requested to participate as a party in this proceeding. Accordingly, as set forth in the provisions and conditions below, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board and having given great weight to the OP and ANC reports the Board concludes that the Applicant has met the burden of proof, pursuant to 11 DCMR §§ 3104.1 and 223, that the requested relief can be granted, subject to the conditions set forth below, as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

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Pursuant to 11 DCMR § 3101.6, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. It is therefore **ORDERED** that this application be **GRANTED** with the following **CONDITION**:

The Applicant shall have flexibility with respect to the use of building materials, except that vinyl siding shall not be permitted.

VOTE: 4-0-1 (Geoffrey H. Griffis, Ruthanne G. Miller, John A. Mann III, and Anthony J. Hood to approve, Curtis L. Etherly not present, not voting).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring member approved the issuance of this order.

FINAL DATE OF ORDER: MAR 24 2004

UNDER 11 DCMR 3125.9, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT."

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3205, FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART, SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

PURSUANT TO 11 DCMR § 3125 APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY

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OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF THE HUMAN RIGHTS ACT OF 1977, D.C. LAW 2-38, AS AMENDED, AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ., (ACT) THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER. RSN

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

Application No. 17134 of V. Jerome Walker, pursuant to 11 DCMR § 3104.1, for a special exception to allow the construction of a two story rear enclosed porch addition to a single-family row dwelling under section 223, not meeting the lot occupancy requirements (section 403), rear yard (section 404) and open court requirements (section 406) in the R-4 District at premises 163 Adams Street, N.W. (Square 3125, Lot 15).

Note: The Board amended the application at the hearing to require special exception relief under section 223, instead of the variance relief originally requested by the applicant.

HEARING DATE: March 23, 2004
DECISION DATE: March 23, 2004 (Bench Decision)

SUMMARY ORDER

REVIEW BY THE ZONING ADMINISTRATOR

The application was accompanied by a memorandum from the Zoning Administrator certifying the required relief.

The Board provided proper and timely notice of the public hearing on this application by publication in the D.C. Register, and by mail to Advisory Neighborhood Commission (ANC) 5C and to owners of property within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 5C, which is automatically a party to this application. ANC 5C submitted a report in support of the application. The Office of Planning (OP) submitted a report in support of the application.

As directed by 11 DCMR § 3119.2, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case pursuant to § 3104.1, for special exception under § 223. No parties appeared at the public hearing in opposition to this application or otherwise requested to participate as a party in this proceeding. Accordingly, as set forth in the provisions and conditions below, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board and having given great weight to the OP and ANC reports the Board concludes that the Applicant has met the burden of proof, pursuant to 11 DCMR §§ 3104.1 and 223, that the requested relief can be

BZA APPLICATION NO. 17134

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granted, subject to the conditions set forth below, as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

Pursuant to 11 DCMR § 3101.6, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. It is therefore **ORDERED** that this application be **GRANTED**.

VOTE: **4-0-1** (Geoffrey H. Griffis, Ruthanne G. Miller, Anthony J. Hood, and John A. Mann III to approve, Curtis L. Etherly, Jr. not present, not voting).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring member approved the issuance of this order.

FINAL DATE OF ORDER: MAR 24 2004

UNDER 11 DCMR 3125.9, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT."

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3125 APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF THE HUMAN RIGHTS ACT OF 1977, D.C. LAW 2-38, AS

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AMENDED, AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ., (ACT) THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER. RSN

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

Application No. 17135 of Kenneth H. Bailey, Jr., pursuant to 11 DCMR § 3104.1, for a special exception to allow the construction of a roof canopy over an existing stair areaway in the side yard of a single-family detached dwelling under section 223, not meeting the side yard requirements (section 405) in the R-1-B District at premises 4414 Albermarle Street, N.W. (Square 1590, Lot 54).

HEARING DATE: March 23, 2004
DECISION DATE: March 23, 2004 (Bench Decision)

SUMMARY ORDER

SELF-CERTIFIED

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR § 3113.2.

The Board provided proper and timely notice of the public hearing on this application by publication in the D.C. Register, and by mail to Advisory Neighborhood Commission (ANC) 3E and to owners of property within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 3E, which is automatically a party to this application. ANC 3E submitted a report in support of the application. The Office of Planning (OP) submitted a report in support of the application.

As directed by 11 DCMR § 3119.2, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case pursuant to § 3104.1, for special exception under § 223. No parties appeared at the public hearing in opposition to this application or otherwise requested to participate as a party in this proceeding. Accordingly, as set forth in the provisions and conditions below, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board and having given great weight to the OP and ANC reports the Board concludes that the Applicant has met the burden of proof, pursuant to 11 DCMR §§ 3104.1 and 223, that the requested relief can be granted, subject to the conditions set forth below, as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

BZA APPLICATION NO. 17135

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Pursuant to 11 DCMR § 3101.6, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. It is therefore **ORDERED** that this application be **GRANTED**.

VOTE: 4-0-1 (Geoffrey H. Griffis, Anthony J. Hood, Ruthanne G. Miller, and John A. Mann III to approve, Curtis L. Etherly not present, not voting).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring member approved the issuance of this order.

FINAL DATE OF ORDER: MAR 24 2004

UNDER 11 DCMR 3125.9, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT."

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3125 APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF THE HUMAN RIGHTS ACT OF 1977, D.C. LAW 2-38, AS AMENDED, AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ., (ACT) THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS,

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PERSONAL APPEARANCE, SEXUAL ORIENTATION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER. RSN

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